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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 160.

HERMAN S. BACHMAN, NATHAN S. BACHMAN, AND DAVID S. BACHMAN, PLAINTIFFS IN ERROR,

vs.

JAMES LAWSON, WILLIAM AUGUSTUS WALKER, JAMES LAWSON, JR., AND THOMAS S. SANDFORD.

IN ERROR TO THE SUPERIOR COURT OF THE CITY OF NEW YORK.

FILED OCTOBER 20, 1880.

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INDEX.

	Original.	Print.
Clerk's certificate	*b.*	1
Certificate of clerk to judgment-roll	1	1
Commencement of case	2	2
Summons	2	2
Complaint	3	2
Schedule A, to complaint (agreement)	9	5
Notice of appearance	10	6
Original answer	11	6
Consent for substitution of attorney	15	8
Order for substitution of attorney	16	8
Amended answer	17	9
Thomas S. Sandford:		
Direct-examination	21	11
Cross-examination	26	13
Redirect examination	30	15
Recalled	44	22
Herman S. Bachman:		
Direct-examination	33	16
Cross-examination	36	18
Cornelius Cole	37	18
William A. Walker	46	20
Exhibit 1. (Copy of agreement)	51	25
2. (Power of attorney)	51	25
3. (Letters of Lawson & Walker to Buchman Bros. & Cole)	53	26
4. Same	54	27
A. Same	55	27

	Original.	Print.
Minutes of verdict	56	28
Postea of judgment	56	28
Notice of appeal	58	29
Affidavit of no opinion	59	29
Certificate of clerk of filing case	60	30
Order of general term	61	30
Notice of appeal for order of general term	62	30
Opinion at general term	63	31
Remittitur from court of appeals	67	33
Order for judgment	71	34
Judgment on remittitur	73	35
Writ of error allowed	75	36
Writ of error	76	36
Citation	78	37
Proof of service	79	37
Bond	80	37
Clerk's certificate	87	40

a In the court of appeals.

JAMES LAWSON AND OTHERS, PLAINTIFFS AND appellants,
against
HERMAN S. BACHMAN AND OTHERS, DEFENDANTS and respondents.

Case on appeal to court of appeals.

Frederic B. Jennings, att'y for plaintiffs, appellants.
Charles F. MacLean, att'y for defendants, respondents.

Filed April 14, 1880.

b Superior court of the city of New York.

JAMES LAWSON & O'RS
against
HERMAN S. BACHMAN & O'RS.

CLERK'S OFFICE,
Superior Court of the City of New York.

I, Thomas Boese, clerk of the superior court of the city of New York, having compared the annexed copy, judgment-roll, notice of appeal to general term, order of general term granting new trial, & notice of appeal to the court of appeals, in the above-entitled action, with the original on file in this office, do certify that the same are correct transcripts therefrom and of the whole of said originals.

In witness whereof I have hereunto subscribed my name and affixed the seal of the superior court of the city of New York, this eleventh day of February, A. D. 1879.

[SEAL.] THOMAS BOESE, *Clerk.*

1 Superior court of the city of New York.

JAMES LAWSON ET AL.
against
HERMAN S. BACHMAN ET AL.

CLERK'S OFFICE,
Superior Court of the City of New York.

I, Thomas Boese, clerk of the superior court of the city of New York, having compared the annexed judgment-roll, case and exceptions, and notice of appeal, in the above-entitled action, with the originals on file in this office, do certify that the same are correct transcripts therefrom and of the whole of said originals.

In witness whereof I have hereunto subscribed my name and affixed the seal of the superior court of the city of New York, this 9th day of October, A. D. 1878.

[L. S.] THOMAS BOESE, *Clerk.*

2 Superior court of the city of New York.

JAMES LAWSON, WILLIAM AUGUSTUS WALKER, James Lawson, junior, and Thomas S. Sandford
against
HERMAN S. BACHMAN, DAVID S. BACHMAN, and Nathan S. Bachman.

This cause came on for trial before Mr. Justice Speir and a jury, at a trial term, on the 5th day of June, 1878.

The summons and pleadings are as follows:

Summons for a money demand on contract.

Superior court of the city of New York.

JAMES LAWSON, WILLIAM AUGUSTUS WALKER, James Lawson, junior, and Thomas S. Sandford, plaintiffs,
against
HERMAN S. BACHMAN, NATHAN S. BACHMAN, and David S. Bachman, defendants.

To the defendants above named and each of them:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office, number 52 Wall street (room 16), within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid the plaintiffs in this action
3 will take judgment against you for the sum of six hundred and thirty-three dollars and fifty-four cents, with interest thereon from the first day of May, one thousand eight hundred and seventy-six, besides the costs of this action.

Dated New York, July 6, 1877.

FREDERIC B. JENNINGS,
Plaintiff's Attorney.

Superior court of the city of New York.

JAMES LAWSON, WILLIAM AUGUSTUS WALKER, James Lawson, junior, and Thomas S. Sandford
against
HERMAN S. BACHMAN, NATHAN S. BACHMAN, and David S. Bachman.

James Lawson, William Augustus Walker, James Lawson, junior, and Thomas S. Sandford, the plaintiffs in the above-entitled action, by Frederic B. Jennings, their attorney, complain of Herman S. Bachman, Nathan S. Bachman, and David S. Bachman, the defendants above named, and thereupon the said plaintiffs state:

First, That at all the times hereinafter mentioned the plaintiffs were and still are copartners, in business in the city of New York, under the firm-name of Lawson & Walker, and that at all such times the defendants were and still are carrying on business in the city of New York, under the firm-name of Bachman Brothers.

4 Second. That heretofore, and on or about the seventeenth day of April, 1863, a cargo of merchandize belonging to the said defendants, of the value of one thousand nine hundred and ninety-four dollars and twelve cents, on the ship Commonwealth, was, with the said ship, captured and burned by the so-called insurgent cruiser Florida, and that the defendants had a just and lawful claim for restitution therefor.

Third. That afterwards, and on or about the twenty-fifth day of April, 1871, at the city of New York, such claim being still unsatisfied, the defendants made and executed a certain agreement in writing, a copy of which is hereto annexed, marked "Schedule A," to which the plaintiffs refer as a part of this complaint, wherein and whereby, among other things, it was expressly agreed by and between these plaintiffs and the defendants that the said plaintiffs, having been by the said defendants therefor and thereunto employed and authorized by power of attorney of even date therewith, should use their best efforts, at their own expense, to collect the claim hereinbefore mentioned, the same being one of the Alabama claims, so called, and which is in the copy of said agreement hereto annexed more particularly described in and by said agreement. The defendants, in consideration of the said undertaking on the part of the plaintiffs, and of the acts to be performed by them thereunder, expressly undertook and agreed to allow and pay to the said plaintiffs a compensation equal to twenty-five per cent. of whatever sum should be collected on said claim.

Fourth. That the said agreement having been so made, afterwards, to-wit, on the day and year last aforesaid, at New York aforesaid, in consideration thereof, and that the said plaintiffs, at the special instance

5 and request of the defendants, had then and there undertaken and faithfully promised the said defendants to perform and fulfill the said agreement in all things on the plaintiffs' part and behalf to be performed and fulfilled thereunder, the said defendants undertook and then and there faithfully promised the said plaintiffs to perform and fulfill the said agreement in all things on the said defendants' part and behalf to be performed and fulfilled.

Fifth. That afterwards, and on or about the twenty-third day of June, 1874, the payment of the said claim, with other Alabama claims, so called, was provided for by the passage of an act by the Congress of the United States, entitled "An act for the creation of a court for the adjudication and disposition of certain moneys received into the Treasury under an award made by the tribunal of arbitration constituted by virtue of the first article of the treaty concluded at Washington the eighth of May, Anno Domini eighteen hundred and seventy-one, between the United States of America and the Queen of Great Britain, to which act reference is hereby made, and by the establishment of a court thereunder known as the Court of Commissioners of Alabama Claims, for the distribution of said moneys upon the presentation of and decision upon said claims.

Sixth. That the said plaintiffs have always, from the time of the making of the said agreement, performed and fulfilled all things on their part and

behalf to be performed and fulfilled thereunder, and did, on the said twenty-fifth day of April, 1871, at New York aforesaid, enter upon the said employment, and between that time and the eighth day of January, 1875, hereinafter mentioned, expended much money, and did and per-
6 formed all and every acts or things necessary or possible for them to do in and about collecting information and preparing the said claim for presentation to the Court of Commissioners of Alabama Claims aforesaid, and between the dates last mentioned prepared a petition to the said court, praying for an allowance of the said claim, and on or about the twenty-sixth day of October, 1874, presented the same to the said defendants for their signature and verification, as required by the act establishing the said court, and the rules of said court in pursuance thereof, and the said plaintiffs have always been ready and willing to present the said petition to the said court and furnish proof of the facts therein stated, to the satisfaction of said court, and collect the moneys due upon said claim, in pursuance of their agreement, of all which said premises the defendants had notice, to wit, on the day and year last aforesaid, and at divers times thereafter.

Seventh. That the said defendants did not nor would perform the said agreement on their part, in this, that they would not sign and verify the said petition when so presented to them by the plaintiffs as aforesaid, or at any time thereafter, but wholly, wrongfully, and without excuse, neglected and refused so to do, on or about the eighth day of January, 1875, and the said defendants, further disregarding their said agreement, did not nor would suffer the said plaintiffs to proceed to present the said claim and collect the moneys due thereunder, but then and there wholly hindered and prevented them from so doing, and then and there wrongfully discharged the said plaintiffs from any further performance of their said agreement, whereby the said plaintiffs have been deprived of the
7 compensation which they otherwise would have received thereunder for the collection of the said claim, and their trouble, labor and expenses in and about the same.

Eighth. That the said defendants, further disregarding their said employment of and agreement with the plaintiffs, afterwards, either on their own behalf or by other attorney or attorneys by them wrongfully employed, presented the said claim to the said court, and thereafter, and on or about the twenty-eighth day of May, 1875, judgment was rendered in their favor, and afterwards, and on or about the first day of May, 1876, the said defendant was paid thereunder, and in settlement of said claim, the sum of three thousand and thirty-four dollars and sixteen cents, and that the amount, equal to twenty-five per cent. thereof, to which the plaintiffs were then and have ever since been intitled, under said agreement, being the compensation which they would have received for the collection of the said claim, and of which they were wrongfully deprived by the defendants as aforesaid, after deducting therefrom the reasonable further expenses which they would have incurred in and about collecting the same, is the sum of six hundred and thirty-three dollars and fifty-four cents.

Ninth. That the said defendants afterwards, to wit, on the first day of May, 1876, were indebted to the said plaintiffs in the said sum of six hundred and thirty-three dollars and fifty-four cents, for moneys paid, laid out and expended by the plaintiffs on their behalf, and for the work

and labor, care, diligence, journeys and attendance of the said plaintiffs by them before that time done, performed and bestowed, as the at-
8 torneys and agents of and for the defendants as aforesaid, and upon their employment and at their request, and for certain compensation and reward due, and of right payable from the said defendants to the said plaintiffs in respect thereof, and being so indebted, the said defendants, in consideration thereof, arterwards, to wit, on the day and year last aforesaid, undertook and faithfully promised the said plaintiffs to pay them the said last-mentioned sum of money when they the said defendants should be thereunto afterwards requested.

Tenth. That although thereunto duly requested the said defendants have not, nor has either of them, nor has any one on their behalf, paid the said sum of money so due as aforesaid, or any part thereof, and the same remains wholly due and unpaid, and the defendants are now justly indebted therefor to these plaintiffs in the said sum of six hundred and thirty-three dollars and fifty-four cents, with interest thereon from the said first day of May, 1876.

Wherefore the plaintiffs demand judgment against the defendants for the sum of six hundred and thirty-three dollars and fifty-four cents, with interest thereon from the first day of May, 1876, besides the costs of this action.

FREDERIC B. JENNINGS,
Attorney for Plaintiffs.

CITY AND COUNTY OF NEW YORK, *ss:*

THOMAS S. SANDFORD, being duly sworn, doth depose and say: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that
9 the same is true to his own knowledge, except as to the matters therein stated upon information and belief, and that as to those matters he believes it to be true; and further saith not.

THOS. S. SANDFORD.

Sworn to before me this sixth day of July, 1877.

JOS. C. HUGHES,
Notary Public, Kings County.

(Certificate filed in N. Y. Co. J. C. H., not. pub.)

Schedule A, referred to in the foregoing complaint.

This agreement, made this twenty-fifth day of April, A. D. 1871, between Messrs. Bachman Bros., of , and Lawson & Walker, of the city of New York, witnesseth, that whereas the said Bachman Brothers have employed said Lawson & Walker, and authorized them, by power of attorney of even date herewith, to collect our claim arising out of the capture of the ship Commonwealth and her cargo, by the armed rebel crusier the Florida, the said Lawson & Walker agree to use their best efforts, at their own expense, to collect the said claim in the shortest practicable time, and to indemnify and save harmless the said Bachman Brothers from and against any and all loss or damage from any of the acts of the said Lawson & Walker in the premises.

And the said Bachman Brothers, in consideration of the premises, agree to allow and pay to said Lawson & Walker a compensation equal
10 to twenty-five (25 %) per cent. of whatever sum shall be collected on the said claim.

In witness whereof we have hereunto set our hand and seal the day and date above mentioned.

BACHMAN BROS.

Notice of appearance.

Superior court of the city of New York.

JAMES LAWSON, WILLIAM AUGUSTUS WALKER, Jas. Lawson, jr., and Thomas S. Sandford
against
HERMAN S. BACHMAN, NATHAN S. BACHMAN, and David S. Bachman.

SIR: Please to take notice that the defendants appear in this action, and that we are retained as attorneys for said defendants therein, and demand that a copy of the complaint and all other papers be served on us at our office, No 206 Broadway (rooms 61 to 65), in the city of New York.

Dated New York City, July 27, 1877.

Yours, &c.,

LAUTERBACH & SPINGARN,
Defendants' Attorneys,
No. 206 Broadway, New York City.

To FRED. B. JENNINGS, Esq.,
Plaintiffs' Attorney.

11 Superior court of the city of New York.

JAMES LAWSON, WILLIAM AUGUSTUS WALKER, James Lawson, jr., and Thomas S. Sandford
against
HERMAN S. BACHMAN, NATHAN S. BACHMAN, and David S. Bachman.

The defendants, answering the complaint of the plaintiffs herein, admit the allegations contained in the first, second, and fifth paragraphs of the complaint.

Defendants, further answering, admit that at or about the time set forth in the complaint the agreement therein referred to was executed by defendants.

Defendants admit that they collected the sum of three thousand and thirty-four dollars and sixteen cents as damages for the loss they sustained by the acts of the so-called insurgent cruiser Florida.

Defendants, further answering, allege, on information and belief, that after the execution of the agreement annexed to the complaint marked "A," and before plaintiffs had entered upon their employment, and before the plaintiffs had rendered any services under said agreement, the said agree-

ment marked "A" was rescinded by and between the parties thereto, and defendants thereupon employed other attorneys and counsel to collect the said claim, and paid the said attorneys and counsel so employed the
12 compensation by them demanded for their services; and defendants allege, on information and belief, that the employment of such other attorneys and counsel was done with the knowledge and consent of the plaintiffs, and the plaintiffs consented to and acquiesced in the employment of such new attorneys and counsel, and the plaintiffs thereupon surrendered and delivered to defendants the papers relating to their claim for damages arising out of the acts of the so-called insurgent cruiser Florida.

Defendants, further answering, allege, on information and belief, that any work and labor performed by plaintiffs was performed after such new attorneys had been employed, and after the agreement marked "A" had been abandoned.

Defendants, further answering, deny that on the 1st day of May, 1876, or at any other time, they promised to pay the plaintiffs the sum of six hundred and thirty-three dollars and fifty-four cents, or any sum whatever.

Defendants, further answering, allege that they have no knowledge or information sufficient to form a belief as to the allegations contained in the complaint not hereinbefore expressly admitted, denied, or modified.

Second. For a second and separate answer and defense, defendants allege:

That after the execution of the agreement referred to and annexed to the complaint, marked "A," and before plaintiffs had performed any services under said agreement, the act of Congress referred to in the fifth paragraph of the plaintiffs' complaint was enacted; and that by the provisions of the eighteenth section of said act all contracts and agreements relating to the collection of such claims whereby a certain per-
13 centage of the amount collected was reserved to attorneys were "cancelled, annulled, and declared" void and of no effect.

That after the passage of said act of Congress defendants entered into a new agreement with Cole, of California, and retained him to protect and represent defendants' interests before the commission created by said act; and plaintiffs were duly notified of such new retainer, and consented to abandon the contract marked "A," and surrendered and delivered to defendants all papers relating to their claim.

Third. For a third and separate answer and defense, defendants allege:

That at the time of the execution of the agreement marked "A" the plaintiffs were copartners under the firm-name of Lawson & Walker, and it was contemplated by and between the parties to the said agreement that said firm of Lawson & Walker would personally represent defendants' interest and collect their claim from the United States Government; that the plaintiffs are not attorneys at law, and said agreement "A" did not contemplate the necessity of employing attorneys and counsel before a tribunal expressly created for the collection of the claims commonly known as Alabama claims.

That after the execution of the agreement marked "A" the plaintiffs' firm was dissolved, and the act of Congress set forth in the complaint was enacted, and thereupon the defendants, with the knowledge and consent of

plaintiffs, retained and employed Cole, of California, to prosecute their claim, and plaintiffs consented to the abandonment of the agreement
14 marked "A," and surrendered to defendants all papers relating to their claim.

Wherefore defendants demand judgment that the complaint be dismissed, with costs.

LAUTERBACH & SPINGARN,
Defendants' Atty's, 206 Broadway, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

Herman S. Bachman, being duly sworn, says: He is one of the defendants in the above-entitled action; that the foregoing answer is true, to his own knowledge, except as to the matters therein stated to be alleged upon his information and belief, and as to those matters he believes the same to be true.

HERMAN S. BACHMAN.

Sworn to before me September 10th, 1877.

GEORGE W. VULTEE,
Notary Public, C. and C. of N. Y.

15 N. Y. superior court.

JAMES LAWSON ET AL.
vs.
HERMAN S. BACHMAN AND O'RS.

We consent and agree that Charles F. MacLean, esq., be substituted in our stead and place as defendants' attorney in the above-entitled action.

New York, September 15, 1877.

LAUTERBACH & SPINGARN,
206 *Broadway.*
BACHMAN BROTHERS,
HERMAN S. BACHMAN.

CITY AND COUNTY OF NEW YORK, *ss:*

On the 29th day of September, 1877, before me personally appeared Herman S. Bachman, personally known to me to be one of the defendants in the above-entitled action, and acknowledged to me that he executed the foregoing consent in his own behalf and on behalf of the other defendants to said action, the defendants being partners under the firm name of Bachman Brothers, and united in interest.

EDWARD W. CRITTENDEN,
Notary Public, Kings Co.

(Cert. filed in N. Y. Co.)

16 Superior court of the city of New York.

At a special term of this court, held at the new court-house, in and for the city of New York, the 29th day of September, 1877.

Present, honorable , justice.

JAMES LAWSON ET ALS.
against
HERMAN S. BACHMAN ET ALS.

Upon reading and filing consent of Messrs. Lauterback & Spingarn,

and of Herman S. Bachman in his own behalf and on behalf of the other defendants, and on motion of Charles F. MacLean, esq., it is ordered that Charles F. MacLean, esq., be, and he hereby is, substituted as attorney for the defendants in the above-entitled action, in the place and stead of *of* Messrs. Lauterbach & Spingarn.

H. C. V. V.

17 Superior court of the city of New York.

JAMES LAWSON, WILLIAM AUGUSTUS WALKER, James Lawson, jr., and Thomas S. Sandford
against
HERMAN S. BACHMAN, NATHAN S. BACHMAN, and David S. Bachman.

The defendants, answering the complaint of the plaintiffs herein, admit the allegations contained in the second and fifth paragraphs of the complaint.

Defendants, further answering, admit that at or about the time set forth in the complaint the agreement therein referred to was executed by defendants. Defendants admit that they collected the sum of three thousand and thirty-four dollars and sixteen cents ($3,034.16) as damages for the loss sustained by the acts of the so-called insurgent cruiser Florida.

And defendants admit that at the time of the execution of the agreement referred to in the complaint the plaintiffs were copartners in business in the City of New York, under the firm-name of Lawson & Walker; and that the defendants were, and still are, carrying on business in the City of New York, under the firm-name of Bachman Brothers.

And defendants admit that on or about the twenty-sixth day of October, 1874, the defendants received from the plaintiffs the draft of
18 a petition to Court of Commissioners of Alabama Claims which they, the plaintiffs, requested them, the defendants, to sign and verify.

Defendants, further answering, allege, on information and belief, that after the execution of the agreement, a copy of which is annexed to the complaint, marked "A," the said agreement was rescinded by and between the parties thereto, and defendants thereupon employed other attorneys and counsel to collect the said claim, and paid such other attorneys and counsel so employed the compensation by them demanded for their services; and defendants allege, on information and belief that the employment of such other attorneys and counsel was done with the knowledge and consent of the plaintiffs, and the plaintiffs consented to and acquiesced in the employment of such new attorneys and counsel, and surrendered and delivered to defendants the papers relating to their said claim. Defendants, further answering, deny that on the first day of May, 1876, or at any other time, they promised to pay the plaintiffs the sum of six hundred and thirty-three dollars and fifty-four cents ($633.54), or any sum whatever.

And defendants, further answering, allege that they have no knowledge or information sufficient to form a belief as to the allegations contained in the complaint not hereinbefore expressly admitted, denied, or modified.

Second. For a second, further, separate, and distinct defense to the alleged cause of action in the complaint set forth, the defendants allege that after

the execution of the agreement, a copy of which is annexed to the complaint marked "A," the act of Congress referred to in the fifth par-
19 agraph of the complaint was enacted; and that by the provisions of the eighteenth section of said act all contracts and agreements relating to the collection of such claims, whereby a certain percentage of the amount collected was reserved to attorneys, were "canceled, annuled and declared" void and of no effect, and that after the passage of said act of Congress, the defendants entered in a new agreement with Cole, of California, and retained him to protect and represent defendants' interests before the commission created by said act, and plaintiffs were duly notified of such new retainer, and consented to and did abandon the agreement with them, and surrendered and delivered to defendants the papers relating to their claim.

Third. For a third, further, separate and distinct defence to the alleged cause of action in the complaint set forth, the defendants allege that the agreement, a copy of which is annexed to the complaint, marked "A," was executed by the defendants to and with the plaintiffs as then being copartners in business in the city of New York, under the firm-name of Lawson & Walker, and contemplated the personal skill and services of each and all of the members of said firm; and that before any material services had been rendered by the plaintiffs under said agreement the said firm of the plaintiffs was dissolved.

Fourth. And for a fourth, further, separate, and distinct defence to the alleged cause of action in the complaint set forth, the defendants allege that the agreement, a copy of which is annexed to the complaint, marked "A," was executed by the defendants, and accepted by the plaintiffs for the purpose and with the view of collecting the said claim of the
20 defendants from the Government of the United States, and not otherwise; that after the execution of said agreement, and before the plaintiffs had rendered any material services thereunder, the act of Congress referred to in the complaint was enacted; that said act provided for the court of commissioners of Alabama claims, and contemplated and required the services of attorneys at law to prosecute claims before said court; that the plaintiffs were not attorneys at law, and thereupon the defendants, with the knowledge and consent of the plaintiffs, retained and employed Cole, of California, who was an attorney at law, able and qualified to prosecute the claim of the defendants before said court; and that the plaintiffs consented to and did abandon said agreement with them, and surrendered to defendants the papers relating to their said claim.

CHAS. F. MACLEAN,
Defendants' Attorney.

CITY AND COUNTY OF NEW YORK, *ss:*

Herman S. Bachman, being duly sworn, says that he is one of the defendants in the above action, and that the foregoing answer is true, to his own knowledge, except as to the matters therein stated to be alleged upon his information and belief; and as to those mattors he believes to be true.

HERMAN S. BACHMAN.

Sworn to before me this 29th day of September, 1877.

EDWARD W. CRITTENDEN,
Notary Public, Kings Co.

(Cert. filed in N. Y. Co.)

21 The plaintiffs, to maintain the issues on their side, called as a witness, THOMAS S. SANDFORD, who, being duly sworn, testified as follows:

I am one of the plaintiffs; James Lawson, William Augustus Walker, James Lawson, jr., and myself, composed the firm of Lawson & Walker; that is the agreement that was made between our firm and the defendants.

(Paper offered in evidence and marked "Plff's Exhibit No. 1.")

That is the power of attorney referred to in the agreement which was shown me.

(Paper read in evidence and marked "Plff's Exhibit No. 2.")

I think it was received by us on or about the day of its signature; our first step under it was to file an abstract of the claim with the Department of State; at that time it was necessary; however these claims would be paid, if at all, the Department of State was the proper place in which to file a notice of the existence of the claim; that we did; we then proceeded to prepare a memorial giving a complete history of all the circumstances attending this claim, which was quite voluminous, and occupied a good deal of time in preparation; that we sent to the Messrs. Bachman for their signature; we prepared the memorial in accordance with the instructions from the State Department which were issued by Mr. Seward; he was then Secretary of State; it is the course we followed in preparing and prosecuting all these claims; I went on to Washington several times to examine into such matters there, what the prospect of a settlement
22 was, what the condition of the case was in the Department of State, and generally to look after the interest of the parties we represented; after the appointment of a commission for the Alabama claims and the adoption or publication of their rules we found it would be necessary to prepare a petition to this court, setting forth substantially what we had already set forth in the memorial which had been filed with the Secretary of State, but in a somewhat modified and concise form. We prepared that petition and sent the copy of it to Bachman Brothers for signature; that petition was not returned to us; the time was drawing near—towards the end of 1874, or the beginning of 1875—when all claims would be barred if not presented to the court. I think the date was the 22d of January, 1875, prior to which all claims must be presented or they would be barred. We then wrote to Messrs. Bachman, very urgently requesting them to return this petition duly signed that we might file it so that the claim might not be lost. We received no reply to that letter and received no petition in return. In order to prepare the memorial we addressed Bachman Brothers a printed form, blank form, which we had ready for that purpose, for circular questions which we asked them to fill out and return to us; those questions were necessary, or rather the answers to those questions were necessary, to enable us properly to fill up and prepare the memorial; that circular was filled up by Mr. Bachman, or by his instructions, and was returned to us, and was used for the basis of preparing the memorial; we then proceeded to complete this memorial; we had an invoice and bill of lading which had beeen furnished us by Bachman Brothers, and a copy of which we had embodied in this memorial;
23 we had to give full particulars as to their place of birth; if they were foreigners, the date of their coming to this country, date of naturalization, the date of the organization of the firm, the character of the

business they conducted, the places where that business was conducted, the ages of each of the parties, and we had to go into a full history of all the circumstances attending the case; we had to set up the claims and state the circumstances of the shipment, state from whom the goods were purchased, by whom they were shipped, on what vessel they were shipped, the value of the goods, circumstances and construction of that ship and her cargo, the circumstances attending the expedition of the Florida, and state where she came from and under what circumstances, and had to go into a complete and full history of all the circumstances.

Q. Will you be good enough to state what occurred after the preparation of the petition?

A. After we sent this petition to Bachman Brothers in San Francisco we received no reply, no acknowledgment of its receipt, and the time was approaching when all claims, if not presented, would be barred, and we wrote them very urgently; in the latter part of 1874 we wrote asking for the return of the petition, as unless we received it prior to the 22d of January, 1875, we would be unable to present that claim; this letter was written some time in the latter part of 1874, and in the month of January, 1875, Mr. Herman S. Bachman, who was the New York representative of the firm, called upon us at our office on Broadway, came and asked us for the invoice and bill of lading of this shipment, which we had, and which we proposed to use in verifying and proving this claim; it is rather
24 difficult to state now what was said; substantially Bachman Brothers wished to be released from the agreement; he also asked for the invoice and the bill of lading on which this claim was based.

Q. You have testified that you sent this petition to Bachman Brothers; did you ever receive it back from them?

A. No, sir; never received it back.

(The counsel for the plaintiffs offers in evidence press copy of letter in which the petition was enclosed, stating that on June 3, 1878, he gave notice to defendants' counsel to produce the original.

The counsel for the defendants objects, on the ground that the notice to produce was too late.

Objection overruled, and the counsel for the defendants then and there duly excepted.)

That is a press copy of the letter in which I enclosed the petition which I have testified I sent the defendant.

(Press copy letter, marked "Pl'ffs' Exhibit No. 3," dated October 19, 1874.)

I recognize the handwriting; I wrote the letter.

(Read in evidence.)

That petition was never returned; never received any written acknowledgment of that letter; I think I wrote them another letter subsequent to that one; our firm had other claims of this sort; there was a large number of them; we had an arrangement for printing and taking testimony, and having that presented by our counsel to the court of commissioners.

25 (The counsel for the plaintiffs offered to show what the probable further expense of collecting the claim would have been, as the defendants are probably entitled to a rebate of the amount of money which it would have cost the plaintiffs after that.

The defendants' counsel objected; the objection was overruled, and the defendants' counsel then and there duly excepted.)

It would have cost us about $125 more to prosecute the claim to recovery; if that paper had been returned to us; then we would have had a party to represent our firm in the court of commissioners; that is all the expense we would have had, that and the printing; I have computed the amount to which we claim we are entitled, less $125; the amount now due, deducting the expenses which we would have incurred, is $633.54.

Q. How do you arrive at that?

A. That being twenty-five per cent. of the amount received by Bachman & Brothers on that claim, less the amount that we should have spent had we prosecuted it.

Q. (By the COURT.) And what is the amount that you deduct?

A. $125, about, would be the amount. I mailed the letter of October 19, 1874, myself; I addressed it to Messrs. Bachman & Brothers, I think, No. 10 Battery street, San Francisco, California; I am not certain about that; I put it in an envelope properly addressed, and put on the regular number of stamps, and put it in the post office.

26 Being cross-examined, witness testified:

I am forty years of age; I reside at Yonkers, New York; I was a member of this firm; our business was that of average adjusters; I have been a member of the firm, I think, since the first of January, 1869; the firm has been in existence since 1859 or 1860; it is now in liquidation; it has been in liquidation since 1872; that was after the agreement on which we sue; the firm since it has been in liquidation has gone on as other firms in liquidation do, closing up its business; James Lawson, William Augustus Walker, James Lawson, jr., and Thomas S. Sandford composed the firm of Lawson & Walker; the firm did not go into any new business after we went into liquidation; I became secretary of an association of steamship companies; the association was formed in May, 1868; I became secretary in May, 1868.

Q. But I understood you to say that after the firm of Lawson & Walker went into liquidation in 1872 you went into some other business.

A. I continued to hold the secretaryship, which I held all the time that I was with the firm of Lawson & Walker; after that I did not devote myself any more to this secretaryship than I did before; I attended to the Alabama claims; the other gentlemen of the firm assisted me as far as was necessary; after the firm of Lawson & Walker went into liquidation Mr. James Lawson retired from business entirely soon afterwards—active business; Mr. Walker continued in the firm of Walker & Hughes, average adjusters, and Mr. James Lawson, jr., continued in charge of the individual underwriters; Mr. James Lawson retired entirely from business in 1874, I think; I couldn't state now precisely at what time in 1874;

27 I couldn't say it was as early as June; I couldn't say it was in May, 1874; I couldn't say it was as late as October; it was some time in 1874, I think; I can't say when Mr. William Augustus Walker became a member of Walker & Hughes; I can't say that was in May, 1874; I don't know that it was as late as 1874; Mr. James Lawson continued in the business of average adjuster for some two years afterwards; that is, down to 1874; since then he retired from business; Mr. James Lawson, jr., after 1872, organized an association known as the Individual

Underwriters' Insurance Association; he was connected with them for some two years; that is down to 1874; he then continued in business as insurance broker and adjuster; I had special charge of that department of the business of Lawson & Walker—the care of the Alabama claims, and my partners at all times——

Q. Never mind about that; prior to writing that letter of October 19, 1874, which you say you wrote, what had you done specifically about this claim of Bachman Brothers?

A. We had filed an abstract of the claim at the Department of State. (Witness refers to a paper.) It was on or about the 26th September, 1871; this is the original memorandum made by myself; not in 1871; it is a statement from my books; I proceeded to prepare a memorial and sent them circular questions; they furnished us the information, I think; we used the answers that were furnished us in preparing the memorial; we sent a number of those printed circulars; the interview I had with Mr. Bachman when I returned him the invoice was in January, 1875; we wrote to the firm in October, 1874; we wrote to the firm before I gave up the invoice; I didn't give up the invoice until Mr. Bachman
28 called on us in January, 1875; I don't know that Mr. Cole had filed the claim before we gave up the invoice; I had no information as to that.

Q. Do you remember an interview with Mr. Bachman on October 30, 1874, in the afternoon?

A. I remember one interview with Mr. Bachman, but I am not certain as to the date; Mr. Bachman came in, and my impression is that it was at the same time we returned the invoice and bill of lading, although we may have returned that subsequently—I am not certain about that—and said that his partners in San Francisco wished him to withdraw the case from our hands, from our care, and wished us to release them; I am not positive about the date of that interview; my impression is that it was subsequent to the letter that I wrote to Bachman Brothers in San Francisco; I remember generally that that was the object of Mr. Bachman's visit so far as I could understand; he said that his partners in San Francisco wished to withdraw the case from our hands, from our care, and put it in the hands of others, and wished us to release them from the agreement that had been entered into; our firm did not collect anything for Bachman Brothers; the second letter I wrote to Bachman Brothers in California was dated some time in December; I think December 7; I did not personally obtain this power of attorney to collect the claim; Mr. Williams did.

Q. Mr. Williams is your agent?

A. He was employed by us to solicit these claims.

Q. That is, Mr. Williams was the agent of your firm to solicit these claims?

A. No, sir; he was employed.

Q. Will you please explain the difference between being employed to do that and his being an agent?

29 The COURT. Let him state the fact and the court will determine.

Q. What was he employed for?

A. He was employed to visit merchants who had claims of this character and solicit the collection of those claims on our behalf.

Q. That is, he was to make representations to them about that and induce them to put the claims in your hands?

A. To represent to them that we were engaged in this business and we were prepared to take claims of this character and prosecute them.

Q. Have you any objection to answering my questions?

(Question repeated.)

A. I don't think that it exactly represents the employment.

Q. Will you point out the difference between that language and the answer you made?

A. I don't think I can.

Q. Mr. Williams solicited these claims and received the power of attorney, or whatever powers were given?

A. He received them from the parties sometimes, and sometimes we received them ourselves.

Q. He received those in San Francisco?

A. He received some of those in San Francisco—not all.

Q. Did you ever have any negotiations, either through him or through other parties, afterwards, to get new powers of attorney in place of those Williams got, on account of those being worthless?

A. No; we frequently, when we prepared memorials, prepared new powers of attorney for signature, as under the instructions of the Department of State we were required to file a separate memorial with all
30 the papers in each case; in many of these cases one firm would have more than one claim—more than one shipment; it was necessary that we should prepare a separate memorial for each shipment, and in that case we prepared a separate power of attorney and a separate set of papers.

Q. Do you mean to say that those were the only cases where you had new powers of attorney?

A. The only cases we had new powers of attorney.

Q. But you didn't have any in this case?

A. We sent a new power of attorney with the memorial to San Francisco in 1872.

Redirect by Mr. JENNINGS:

Q. Who took charge of the collection of these claims—doing the work that was necessary to be done for their collection in your office—from the time you first got hold of them?

A. That department of business was in my hand; in my charge.

Q. Was it put in your charge by the other members of the firm?

(Objected to; overruled; exception taken.)

A. Yes, sir.

Q. What, if anything, did the other members of the firm have to do with these claims?

(Objected to; overruled; exception taken.)

A. Having charge myself of the details of this business I had very little occasion to call upon the other members of the firm until after the
31 appointment of the Court of Commission's of Alabama Claims; I then called upon them as occasion required for assistance.

Q. Did you or not continue to give the same personal attention to these claims after the firm went into liquidation that you had done before?

A. Yes, sir; precisely the same.

Q. Did you or not have the advice of the other members of the firm with reference to them after that time as before?

A. Yes, sir; at all times.

Q. Did you ever receive or hear any complaint made by any of the defendants of the lack of proper attention given to the claims by your firm?

A. No, sir.

Q. You have been interrogated as to the interview, placed by my friend at October 30, 1874, probably occurring in the fall of that year some time. Were there two interviews?

A. I am not very positive as to two interviews. There might have been.

Q. Who were present at that last interview as to which you have given some testimony?

A. Mr. Walker, Mr. Low, and myself were present at the interview, which I particularly remember.

Q. Was Mr. Bachman present?

A. And Mr. Bachman and another gentleman whom I didn't know.

Q. You stated that at that interview Mr. Bachman said that his partners in San Francisco wished you to release them from their obligations under that contract. What answer did you make to that question?

A. We declined to do so.

The plaintiffs here rested.

32 The counsel for the defendants moved to dismiss the complaint on the following grounds:

First. On the ground that the plaintiffs have not shown a performance of the contract.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Second. On the ground that the plaintiffs cannot recover on the contract, but for damages for the breach of it, if they can recover at all.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Third. On the ground that the plaintiffs cannot recover, on the ground that they were prevented from performing the contract, because they have not pleaded that they were prevented from performing it.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Fourth. On the ground that the plaintiffs have not shown that they were prevented from performing the contract.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Fifth. On the ground that the agreement was that the defendants were to pay a certain percentage of the claim as a compensation for the collection of the same, and that under a reasonable construction of the
33 contract plaintiffs cannot recover unless they collected the same, and that it appears by their own showing that they did not so collect.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Sixth. On the ground that there was no consideration; that when the claim was made, in 1871, there was no valid claim upon which to base the contract.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Seventh. And on the ground that the agreement was annulled and rescinded by the act of Congress subsequently passed relative to the Alabama claims.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

The defendants to maintain the issues upon their part called as a witness HERMAN S. BACHMAN, who, being duly sworn, testified as follows:

My full name is Herman S. Bachman; I reside in New York; I am in business here; I am a defendant in this case. About 1871—I think it was in the fall of 1871—a gentleman walked to my office and presented himself and said, "I am Mr. Williams." "I am glad to see you." "I come from California." Mr. Williams said he was a Washington man and he came from California.

(Plaintiffs objected, and moved to strike out; motion granted.)

The COURT. You are to stand by this contract and nothing else.

34 I have seen this paper (Plaintiffs' Exhibit No. 1). This paper (Plaintiffs' Exhibit No. 1) is signed by N. S. Bachman, H. S. Bachman, and D. S. Bachman, by H. S. Bachman. I had no authority to sign any other name than mine; than one partner for another. It was merely a memorandum. Lawson & Walker never collected anything for me or my firm. Besides asking me to sign this paper, I think, they made out some paper before anything was commenced. I never paid any more attention to it.

Q. Was anybody else employed to go on with this matter?

A. Yes, sir.

Q. Who was that?

A. Senator Cole.

(Plaintiffs objected as immaterial, and moved to strike out; motion granted, and the counsel for the defendants then and there duly excepted.)

Mr. Cole filed the petition in June, 1874, and some months after that I went to Mr. Sandford, to Lawson & Walker's office; I saw Mr. Sandford and Mr. Walker; I don't think there was any one else there; I explained to Mr. Sandford in the outer office that as matters were now, and because that was necessary for to collect these claims, that Senator Cole, of California, had our claims, and my folks decided to get the proofs, bill of lading, and invoice; that he had written to us that a letter which he had to file on the docket, number so and so, was under way; I told them to come right down; it was on October 30th, in the afternoon; I made a copy in the afternoon. I am reading from a note that I made after coming back;

35 I told them that our claim was given to Senator Cole, of California, and there was nothing to do but to give me the papers; I asked Mr. Sandford for the bill of lading, so that I could give it

to Senator Cole; I meant that he had entered the claim on the docket of the Court of Claims; Mr. Walker and Mr. Sandford expressed regret, and hoped that I could persuade Mr. Cole to let them have the papers; that they now understood the matter perfectly, and were fixing papers for it, and had a lawyer engaged—these items I put down at the time; there was a little talk, and finally he gave me the bill of lading and the invoice; I asked them to give me back that power, and Mr. Sandford consulted with Mr. Walker, and they thought they would not; well, there was a third party that might come back on them some day; I said "good afternoon gentlemen;" but there was an interview before that; I came away taking the papers with me; I have a little memorandum of the other interview; there was an interview about October 19th; there had been passing some letters between us; I said then that Mr. Cole was attending to this matter, and Mr. Cole was pressing for the letters in this business, and in other matters; and Mr. Sandford asked me if I should like to have them have it, and he wrote on a piece of paper to telegraph out to my folks, "let Bachman & Brothers substitute, as counsel, our man, Mr. Low;" that is Mr. Sandford's writing; well, I did; but it seems that Mr. Cole had it; they wouldn't do it; and then, after he wrote back, they gave me my papers back, and I said "good afternoon." I had an interview at the office of Lawson & Walker on October 19th; on that occasion Mr. Sandford wrote this memorandum on a piece of paper, "won't Bachman & Brothers substitute, as counsel, Low in place of Senator Cole;" I tele-
36 graphed that out; on October 30th I saw them again, and on that occasion they returned me the papers.

Being cross-examined witness testified:

I think Mr. Sandford was in the office, and Mr. Walker, at the interview of October 19th—these two, no others; Mr. Walker came out and consulted; generally consulted with each other in a pleasant way; at the interview of October 30th the same people were present; I am sure the invoice and bill of lading were returned at the interview of October 30th; I explained to you how I am positive, because I wrote that on a piece of paper that afternoon; there might have been another interview; I might have gone down the next day after October 30th and got the papers, or a few days afterwards, because there was considerable telegraphing between the two parties.

Q. Did you have more than the other interview on January 20th or whatever it was?

A. On this interview of October 30th there was some talk between us as to the plaintiff's relinquishing their claim; they did not tell me at that time that they couldn't relinquish it; they didn't say that there were third parties interested in it so that they had no right to relinquish it.

Q. Didn't you state on your direct-examination that they said that third parties were interested?

A. For that reason they didn't give me back my agreement.

Q. And they positively refused to give you the agreement and power of attorney; you tried to get them?

A. I asked them to give me the bill of lading and the papers.

37 By the COURT:

Q. The invoice and bill of lading were your property?

A. Yes, sir; they were the case; they were furnished by us; they came to us in the first place; we took them when we sent these goods on this ship, and they belonged to us; and they were returned to us; we handed them to Lawson & Walker; that is all I ever gave to them; I suppose we reserved our property in them and they belonged to us; on this first interview, on the 19th of October, they asked me to write our people in San Francisco to have Mr. Low, whom they had retained as their counsel, substituted in place of Mr. Cole, and I sent the telegram in accordance with those instructions.

Q. They didn't say anything about waiving their rights then?

A. Yes, sir; a great deal of conversation.

Q. They didn't say they waived their rights then?

A. There was a great deal of conversation; there were letters passing between the parties.

Q. But this was the result of the conversation, that they asked you to send to your people in San Francisco to substitute Low in place of Cole?

A. They begged me to send it.

Q. And in pursuance of that you sent that telegram?

A. Yes, sir.

The counsel for the defendants introduces the testimony of CORNELIUS COLE, as a witness for the defendants, taken by commission, as follows:

My name is Cornelius Cole; I am forty-five years old; my occupation is that of a lawyer; place of business, San Francisco; residence, same;
38 I know only Nathan S. Bachman and David S. Bachman, defendants; I have known them about three years; yes, I was employed by the Bachmans in San Francisco late in 1874, to collect their Alabama claims, so called.

Q. If to the last interrogatory you shall answer that you were so employed, state what your business then was at that time, and the nature and extent of your employment.

A. My business at the time mentioned was that of a duly authorized attorney and counsellor, and I was engaged as such to bring the action at law on the Bachman Brothers' claim, rendered necessary by the act of Congress of June 23d, 1874, and the rules of the Court of Commissioners of Alabama Claims, made in pursuance of said act; that was the nature and extent of my employment, the services of a lawyer being necessary if not indispensable in the case.

(The counsel for the plaintiffs objected to and moved to strike out all the above answer but "my business at the time" down to "rendered necessary;" objection sustained, and the part objected to stricken out, and the counsel for the defendants then and there duly excepted.)

Q. If to the third interrogatory you have answered that you were employed as enquired about, state fully and particularly what you did, if anything, in the course of such employment.

A. I did whatever was requisite and necessary to maintain the action of my clients, the Bachman Brothers, for losses by rebel cruisers, consulting with them from time to time, drawing up and causing to be verified the petition or complaint, filing the same in the court at Washington,
39 obtaining orders to print, to take testimony, &c., giving notices of the taking of testimony, proving the citizenship and loyalty of the

parties, the nature and extent of their losses, and so on; this evidence was all taken in San Francisco by commission, and I caused it to be forwarded to the clerk of the court at Washington and filed; I prepared and filed a brief in the cause May 4th, 1875, and May 26th, 1875; I tried the cause in open court and obtained a judgment May 28th, 1875, for $1,994.12, and interest, and at length received a draft on the Treasury of the United States for the money, amounting to $3,034.16; this I delivered to Bachman Bros., in San Francisco, California, May 22d, 1876; this is, I think, as fully and particularly as I need state the services, though much else was done by me as attorney and counsel in the progress of the case.

(Counsel for the plaintiffs moved to strike out the whole answer, excepting the portion between the words "I tried the case in open court," and "Bachman Brothers, in San Francisco, California, May 2d, 1876." Motion granted, and the counsel for the defendants then and there duly excepted.)

Q. If to the last interrogatory you have stated any services rendered as enquired about, state whether you did or did not receive compensation therefor; if yea, state from whom, the date or dates, and amount.

(Question objected to as immaterial; objection sustained, and the counsel for the defendants then and there duly excepted.)

Q. Had you at any time, either before or after your employment
40 by the defendants, testified to any interview, conversation, or communication with the plaintiffs, or any or either of them, with reference to any agreement with, or employment of, them by the defendants, or with reference to your employment, or in the course of your employment, or connected with the subject-matter on which you were employed? If yea, state the same as fully and particularly as you now can, the number of times, the respective dates, who were present, what was said and done.

A. I have never had any conversation or interview with either of the named plaintiffs, so far as I can remember. I believe I have seen Mr. Thomas S. Sandford in the Court of Commissioners of Alabama Claims, but did not then know, nor till I saw some papers in this suit, that he was a partner of Lawson & Walker. The Mr. Sandford I have in mind is an attorney at law, but Lawson and Walker, I have understood, are not attorneys at law at all, and I may be mistaken as to the person of Mr. Sandford, or as to the attorneyship of Lawson & Walker. [Some years before the law of June 23d, 1874, was passed by Congress a man who called himself Captain Williams, not a lawyer, solicited Alabama claims here in San Francisco for Lawson & Walker. He represented himself as a sort of partner in this business, or agent of Lawson & Walker, and after the said law of June 23d, 1874, relating to such claims, had passed Congress this Captain Williams still claimed to have control of these claims, including Bachman's, which he had obtained by solicitations as aforesaid from Lawson & Walker, and he repeatedly urged me to make terms with him by which I, as attorney, should take charge of said claims, and divide
the fees for prosecuting them with him. He was very importunate
41 and persistent about this matter, but I uniformly refused, stating to him over and over again that under the eighteenth section of said law the court must fix the compensation of attorney and counsel; which, so far as I was concerned, I could not with propriety, and would

not, divide with any one. He insisted that he had agreements with parties for compensation, and that it was under such agreements, coupled with powers of attorney, that he had control of claims, and the right to share in them when collected. The claim of Bachman Brothers I am quite certain was among those which he had assumed thus to control. I did not learn until some time afterward that Lawson & Walker had repudiated this Captain Williams, a step, I think, taken by them none too soon. Failing to make terms with me, Captain Williams got as many cases as he could for another attorney of San Francisco, and kept as many out of my hands as he possibly could. It was not through his agency in any sense that the claim of Bachman Brothers came to my hands. I allude to Captain Williams in this connection because he was at one time closely associated with the plaintiffs in connection with this claim of the Bachman Brothers, and other similar claims, and I am not certain that they (Lawson & Walker) notified more than one party of the severance of such connection, and then only after years had elapsed.] That portion of interrogatory seven which alludes to communications with plaintiffs I will answer under the next interrogatory.

(The counsel for plaintiffs moved to strike out as immaterial so much of the answer as is included between the words "some years before the law of June 23d, 1874," and "that portion of interrogatory seven,"
42 *in the last sentence of said answer; motion granted, and the counsel for the defendants then and there duly excepted.)

Q. Look at the paper annexed marked "Exhibit A," and say if you were ever in the receipt or possession thereof. If yea, state how, when, where, and particulars relating thereto.

A. The paper marked "Exhibit A" I received in due course of mail from Lawson & Walker; it must have been received in San Francisco, California, about the middle of January, 1875, and was, as appears, in reply to a letter addressed by me to them in New York City. Learning that some years prior to that time, either through the solicitation of Captain Williams or otherwise, the Bachman Brothers had somehow entrusted their Alabama claims to Lawson & Walker, I thought it worth while to address them on the subject before going very far in the case. Though I construed the law of June 23d, 1874, as nullifying all contracts relating to the collection of said claims made prior to its passage, the law rendered a regular action in court and the employment of an attorney at law necessary in any claim; whereas prior to said act of June 23, 1874, it was supposed any person, though not a lawyer, could collect a claim of this sort. The features about the paper marked "Exhibit A" that struck me was that Lawson & Walker were in liquidation, as appeared from the top and bottom of their letter. It did not appear that either Lawson or Walker, or any person connected with the firm, was a lawyer, and I did not then know, nor till long afterward, that any person besides Captain Williams was in any way connected with Mr. Lawson and Mr. Walker, and I rather presume that they were alluding to him (Williams) when they spoke
43 of "third parties having any interest," and I now say that if they did not allude to him I do not know to whom they did allude, for they say "we (meaning, as it appears now, all the members of the firm) would most cheerfully concede (accede) to the wishes of your good self (to

* Inclosed in brackets.

prosecute the claim of Bachman Brothers) and to the wishes of the Messrs. Bachman (that I should prosecute for them), were it not for the situation of things;" and they add, "we don't see why the Bachmans don't take the responsibility, like General Jackson, and go ahead the way they evidently want to;" that is, why don't they go ahead and have me prosecute their claim. This seems to me to be their meaning, and if so it was as much of a consent as the firm of Lawson & Walker, including all members of it, could give that I should go ahead with the claim. I cannot even now say what other construction could be given to the last-quoted expression. I showed this letter, marked "Exhibit A," to the Bachmans, and they did take the responsibility, like General Jackson, or any other man, to go ahead, continuing my employment as their attorney in connection with their said claim, regarding only the law of June 23, and disregarding what had been done touching the matters years before at the solicitations of Captain Williams, or otherwise under a very different condition of things.

(Counsel for the plaintiffs moves to strike out all the answer except "the paper marked 'Exhibit A,' I received in due course of mail from Lawson & Walker. It must have been received in San Francisco, California, about the middle of January, 1875, and was. as appears, in reply to a letter addressed by me to them, in New York City," and "I showed this letter,
44 marked 'Exhibit A,' to the Bachmans," as immaterial; motion granted and the counsel for the defendants then and there duly excepted).

I will say that the state of facts as existing at the time the claim of Bachman Brothers was entrusted to Lawson & Walker differed very essentially from the facts existing at the time I took the said claim. A space of three or four years had intervened, and during that time nothing effectual could be done, though it was supposed by persons soliciting these claims that they would be paid by the British Government on application of our State Department, and litigation by the several claimants was not contemplated. But the act of June 23d, 1874, changed all this, rendering a suit and litigation in each case necessary, and nullifying all prior agreements regarding their collection. Whatever agreement was made, therefore, between Bachman Brothers and Lawson & Walker was made long before the act of Congress referred to, and could not have contemplated that act at all. That act rendered nugatory any and all steps, if any had been taken, for the collection of these claims, and prescribed in detail the mode of procedure for their collection.

The defendant, rested.

The plaintiff recalled, in rebuttal, THOMAS S. SANDFORD, who testified as follows:

Q. With regard to these interviews, do you remember the interview, October 19, testified to by Mr. Bachman?

(Objected to as already gone over; objections overruled and defendants' counsel then and there duly excepted.)

45 A. I do; Mr. Bachman said that his partners wished to place this case in Mr. Cole's hands, but intimated that he, Mr. H. S. Bachman, would prefer to continue it in the hands of Lawson & Walker. I asked what should be done to continue to retain it in the hands of Lawson & Walker; I wrote on that piece of paper asking him to telegraph to the house, in San Francisco, to have our counsel, Mr. Low, substituted in

place of Mr. Cole, which would continue the case in the hands of Lawson & Walker; I think that was on the first interview; I cannot remember anything else that passed, distinctly; at the next interview, as near as I can recollect, Mr. Bachman came in and told us that his people in San Francisco insisted upon leaving this in Senator Cole's hands, and asked us for the invoice and bill of lading, which had been furnished us, which we had no right to retain; they were subject to their orders on demand, and we consequently surrendered them; we were not asked at that interview for the agreement and power of attorney; Mr. Bachman intimated that he would like to have the agreement canceled, and have Bachman Brothers released from their obligations, which, as I said before, we declined to do; I don't remember a subsequent interview.

(Plaintiff's counsel offered in evidence press copy of letter to Bachman, of San Francisco, having given notice on the 3d of June, 1878, to produce the original.)

Mr. MacLean: Before this goes on I shall make the objection that this notice to produce a letter sent to California, a notice given on Monday, is something unprecedented; that it is too late.

The Court: It is not a good objection. You could have telegraphed for them.

46 Mr. MacLean: We could not have got them even then.

(And the counsel for the defendants then and there duly excepted.)

That writing is mine; I wrote that letter (Letter dated December, 1872, offered in evidence, marked "Plaintiff's Exhibit No. 4"); I mailed that letter myself; I enclosed it in an envelope to Messrs. Bachman & Brothers, Battery street, San Francisco, California, and put on it a postage stamp.

Being cross-examined, witness testified:

This letter was mailed in December, 1872.

Q. Did you ever hear anything from Bachman after that, except one letter saying that they declined to answer anything further; that they had put it in the hands of Mr. Cole?

A. I can't say; I think I saw Mr. Bachman several times after that; I think I saw him in 1872, and different occasions.

Q. Was anything ever done under that letter?

A. I don't think that we ever received anything.

Q. You never took any means to constrain them?

A. Yes, sir; we wrote them subsequently.

Q. You never took any legal means to restrain them from carrying out what you considered your part of the contract?

A. No, sir.

William A. Walker, called as a witness for the plaintiffs, and being duly sworn, testified: I was present at an interview, but I don't

47 remember the precise date; some time I think in October; I have heard the testimony of Mr. Bachman, with regard to those interviews; it was the interview which he has fixed on that day; I remember Mr. Bachman calling there with another gentleman, and asking us to release him from the agreement which he had made with us, and our declining to do so; that is substantially the result of that interview; I don't remember the precise words, of course, it is such a long time ago.

Plaintiffs rest.

The counsel for the defendants moves to dismiss the complaint on the following ground, or for a non-suit:

First. On the ground that the plaintiffs have not shown a performance of the contract.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Second. On the grounds that the plaintiff cannot recover on the contract, but for damages for the breach of it, if they can recover at all.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Third. On the ground that the plaintiffs cannot recover for damages for the breach of the contract, because they have not placed their action on that ground, but have pleaded a performance of the contract.

(Motion denied, and the defendants' counsel then and there duly excepted.)

Fourth. On the ground that the plaintiffs cannot recover on the
48 ground that they were prevented from performing the contract, because they have not pleaded that they were prevented from performing it.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Fifth. On the ground that the plaintiffs have not shown that they were prevented from performing the contract.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Sixth. On the ground that the agreement was that the defendants were to pay a certain percentage of the claim, as a compensation for the collection of the same, and that under a reasonable construction of the contract plaintiffs cannot recover, unless they collected the same, and that it appears by their own showing that they did not so collect.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Seventh. On the ground that there was no consideration, that when the claim was made in 1871, there was no valid claim upon which to base the contract.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Eighth. On the ground that subsequent to the making of the agreement a state of facts arose not contemplated by it, and it became inoperative.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

49 Ninth. On the ground that the act of Congress of June 23, 1874, rendered the action of attorneys at law necessary for the collection of the claim, and the plaintiffs, not being attorneys at law, could not collect the claim, or carry out the agreement if it subsisted.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Tenth. On the ground that the agreement was one of personal trust and confidence, and the defendants were entitled to the personal services of each and all of the plaintiffs, and that it appears that by going into

liquidation and into other business and employments, the defendants were deprived of the personal services of each and all of the plaintiffs.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Eleventh. On the ground that the agreement was one of personal and special trust and confidence, and the plaintiffs had no right or authority to employ an attorney.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Twelfth. On the ground that the agreement was annulled and rescinded by the act of Congress subsequently passed relative to the Alabama claims.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

Thirteenth. On the ground that the agreement was rescinded in fact between the parties.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

50 Fourteenth. On the ground that so far as the plaintiffs and their interest was concerned the agreement was rescinded by consent between the parties, and it does not appear that any other party had any interest or required them to prosecute the claim.

(Motion denied, and the counsel for the defendants then and there duly excepted.)

The counsel for the plaintiffs requested the court to direct a verdict for the plaintiffs.

(The counsel for the defendants objected, and insisted that there was enough to go to the jury, particularly as to the question of rescission of the agreement. The objection was overruled and the counsel for the defendants then and there duly excepted.)

The court directed a verdict for the plaintiffs for $633.34 damages, and $92.36 interest.

(The counsel for the defendants then and there duly excepted to such direction.)

(The jury, under the direction of the court, finds a verdict in favor of the plaintiffs for $725.90.

The counsel for the plaintiffs moved for an extra allowance of five per cent. on the amount of the verdict.

(The counsel for the defendants objected. Objection overruled; motion granted; and the counsel for the defendants then and there duly excepted.

51 EXHIBIT 1.

This agreement, made this 25th day of April, A. D. 1871, between Messrs. Bachman Brothers, of , and Lawson & Walker, of the city of New York, witnesses:

That whereas the said Bachman Brothers have employed said Lawson & Walker, and authorized them, by power of attorney of even date herewith, to collect our claim arising out of the capture of the ship Commonwealth and her cargo by the armed rebel cruiser the Florida, the said

Lawson & Walker agree to use their best efforts, at their own expense, to collect the said claim in the shortest practicable time, and to indemnify and save harmless the said Bachman Brothers from and against any and all loss or damage from any of the acts of the said Lawson & Walker in the premises.

And the said Bachman Brothers, in consideration of the premises, agree to allow and pay to said Lawson & Walker, a compensation equal to twenty-five (25 %) per cent. of whatever sum shall be collected on the said claim.

In witness whereof we have hereunto set our hand and seal the day and date above mentioned.

BACHMAN BROS.

EXHIBIT 2.

Know all men by these presents that we, H. S. Nathan and David Bachman, composing the firm of Messrs. Bachman Brothers, of New York City, have appointed James Lawson, William Aug. Walker, James
52 Lawson, jr., and Thomas S. Sandford, of the city of New York, composing the firm of Lawson & Walker, or either of them, attorney or attorneys to prosecute and collect by such lawful proceedings and means as to them may appear expedient our claim arising out of the capture of the ship Commonwealth and her cargo by the armed rebel cruiser the Florida, in the month of ; the said claim to be prosecuted at the cost and charge of the said Lawson & Walker, who are hereby authorized to receive for our account whatever sum or sums of money may be awarded on said claim, and give in name proper acquittances therefor, and to execute all papers necessary to secure the proper transfer of said claims to any party, department, or goverment who may assume the payment thereof.

* * * * * * *

The said Lawson *v.* Walker are hereby authorized to employ for the prosecution of the said claim such attorney or attorneys as they may think fit.

Hereby ratifying all that our said attorney or attorneys may lawfully do in the premises.

As witness our hands and seal, at New York, this twenty-fifth day of April, A. D. one thousand eight hundred and seventy-one.

(Signed) HERMAN S. BACHMAN,
(Signed) N. S. BACHMAN,
Per H. S. BACHMAN, *Att'y.*
(Signed) D. S. BACHMAN,
Per H. S. BACHMAN, *Att'y.*

53 STATE OF ,
County of , *ss:*

On the day of , in the year one thousand eight hundred and seventy- , before me, personally came , known to me to be the individuals described in, and who executed the foregoing instrument, and acknowledged that executed the same.

EXHIBIT 3.

No. 29 BROADWAY, *October 19th*, 1874.

Messrs. H. S. Bachman, Nathan S. Bachman, and David S. Bachman, composing the firm of Bachman Brothers, San Francisco, Cal.:

GENTLEMEN: We enclose, for your approval and signature, a petition addressed to the Court of Commissioners of Alabama Claims, necessary to enable us to present your claim for losses consequent upon the destruction of the ship Commonwealth, to that court.

If you find it to be correctly stated, you will please fill out the places of your several residences from April 13th, 1861, to April 9th, 1865, and the particulars of the time, places, and courts by which your certificates of naturalization were granted, and then sign your names, individually, at the two places we have indicated in pencil on pages 2 and 3, and acknowledge those signatures before a United States commissioner. You will also please return to us with the petition, when signed, the
54 memorial, also signed, which we forwarded you for signature on December 11, 1872, and duplicate copies, procured from the court by which the originals were granted, of your certificates of naturalization.

Your early attention will oblige.

Yours truly,

(Signed) LAWSON & WALKER, *In liq.*

EXHIBIT 4.

DECEMBER 11, 1872.

Messrs. BACHMAN BROTHERS, *San Francisco, Cal.:*

GENTLEMEN: We have the pleasure to hand you herewith, for approval and acknowledgement, a statement of your claim per Commonwealth. If you find it correct, you will please sign the memorial, individually, on page 7, and acknowledge execution of the same before a notary, who should use the form of jurat we have attached, and also sign and acknowledge the enclosed power of attorney. Then procure the signatures and acknowledgements of Messrs. Schweitzer and Freidman, to the affidavits prepared for them on pages 9 and 11, respectively, and return the papers to Mr. H. S. Bachman, or to us direct, that we may complete and file them. Captain Williams, who solicited these claims for us, is no longer our agent or authorized to act for us.

We are, gentlemen, very truly yours,

(Signed) LAWSON & WALKER.

55 EXHIBIT A.

[29 Broadway, office of Lawson & Walker, in liquidation.]

NEW YORK, *February 8th*, 1875.

C. COLE, Esq., *San Francisco:*

DEAR SIR: We have yours of the 12th touching the Bachman matter. Our mutual friends, the Bachmans, with the best of intention, no doubt, have made matters a little awkward for us. So far as we ourselves are concerned we would be willing to let our own interests slide; but there are third par-

ties having an interest whose consent we cannot obtain. One of the Bachmans called on us here and we tried to explain matters, but nothing would suit him short of an unconditional release from us, which it must now be obvious to you we could not give without prejudice. We would most cheerfully concede to the wishes of your good self and the Messrs. Bachman were it not for the situation of things. Having gone so far, we don't see why the Bachmans don't take the responsibility, like Gen. Jackson, and go ahead the way they evidently want to. Will you be likely to remain in San Francisco all winter?

Very truly,

LAWSON & WALKER, *in lig.*

56 At a trial term of the superior court of the city of New York, held at the city hall, in the city of New York, on the 5th day of June, A. D. 1878.

Present, Judge Gilbert M. Speir.

F. B. Jennings.

JAMES LAWSON ET AL.
against
HERMAN S. BACHMAN ET AL.

C. F. MacLean.

Verdict 847.

Under the direction of the court the jury say that they find a verdict for the plaintiff, and assess the damages at the sum of $725.90. An extra allowance of 5 % granted to pl'ff. All proceedings, except entry of judgment, stayed for 40 days. (Extract from the minutes.)

THOMAS BOESE, *Clerk.*

Superior court of the city of New York.

JAMES LAWSON, WILLIAM AUGUSTUS WALKER, James Lawson, junior, and Thomas S. Sandford.
against
HERMAN S. BACHMAN, DAVID S. BACHMAN, and Nathan S. Bachman.

Judgment.—July 1st, 1878.

57 The above-entitled action having come on to be tried in its order on the calendar, and having been tried before Mr. Justice Spier and a jury at a trial term, part 3, of this court, and the jury having found a verdict for the plaintiffs by direction of the court, and the costs of said plaintiffs having been adjusted at the amount in that behalf hereinafter stated:

Now, upon motion of Frederic B. Jennings, attorney for said plaintiffs, it is adjudged that James Lawson, William Augustus Walker, James Lawson, junior, and Thomas S. Sandford, the plaintiffs above named, recover

of Herman S. Bachman, David S. Bachman, and Nathan S. Bachman, the above-named defendants, the sum of seven hundred and twenty-five dollars and ninety cents, the amount of the verdict aforesaid, together with the sum of one hundred and seventy-one dollars and thirty-seven cents, the costs and disbursements of said plaintiffs in said action as adjusted, amounting altogether to the sum of eight hundred and ninety-seven dollars and twenty-seven cents, and that the said plaintiffs have execution against said defendants therefor.

THOMAS BOESE, *Clerk.*

58 *Notice of appeal.*

Superior court of the city of New York.

JAMES LAWSON, WILLIAM AUGUSTUS WALKER, James Lawson, junior, and Thomas S. Sandford, plaintiffs,
against
HERMAN S. BACHMAN, DAVID S. BACHMAN and Nathan S. Bachman, defendants.

Take notice, that the above-named defendants, Herman S. Bachman, David S. Bachman and Nathan S. Bachman, hereby appeal to the general term from the judgment entered in this action in the superior court of the city of New York, on the first day of July, in favor of the plaintiffs, against the defendants, for the sum of eight hundred and ninety-seven dollars and twenty-seven cents ($897.27).

New York, July 18th, 1878.

Your obedient servant,

CHARLES S. MACLEAN,
Def'ts Att'y.

FREDERIC B. JENNINGS, Esq., *Pl'ffs' Att'y*, and
THOMAS BOESE, Esq., *Clerk.*

59 Superior court of the city of New York.

JAMES LAWSON ET ALS.
against
HERMAN S. BACHMAN ET ALS.

CITY AND COUNTY OF NEW YORK, *ss:*

Edward W. Crittenden, being duly sworn, says that he is managing clerk of Charles F. MacLean, attorney for the defendants; that this cause was tried before Mr. Justice Speir and a jury on the 5th day of June, 1878, and that no written opinion was given by the said justice, as he verily believes.

EDWARD W. CRITTENDEN.

Subscribed and sworn before me this 7th day of October, A. D. 1878.

CHAS. E. SHADE,
Notary Public, N. Y. Co.

60 Superior court of the city of New York.

JAMES LAWSON ET ALS.
against
HERMAN S. BACHMAN ET ALS.

I, Thomas Boese, clerk of the superior court, do hereby certify that the case and exceptions in the above-entitled action, as settled by the judge who tried the cause, were duly filed in this office on the 8th day of October, 1878, by order of the said judge.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of the superior court of the city of New York, this 10th day of October, A. D. 1878.

[L. S.] THOMAS BOESE, *Clerk.*

61 Superior court of the city of New York.

At a general term of this court, held at the court-house, in and for the city of New York, the sixth (6th) day of January, in the year of our Lord one thousand eight hundred and seventy-nine (A. D. 1879).

Present, Hon. William E. Curtis, chief-justice;
" John Sedgwick, and
" John J. Freedman, justices.

JAMES LAWSON ET AL.
against
HERMAN S. BACHMAN ET AL.

The appeal from the judgment coming on to be heard, after hearing Charles F. MacLean, of counsel for the defendants, appellants, in support of the appeal, and , esquire, of counsel for the plaintiffs, respondents, in opposition thereto, and due deliberation being had thereon, on motion of Charles F. MacLean, attorney for the defendants, appellants, it is ordered that the judgment appealed from be, and the same is hereby, reversed, and a new trial had, with costs of appeal to the defendants, appellants to abide the final issue or event of the action.

A copy.

THOMAS BOSE, *Clerk.*

62 Superior court of the city of New York.

JAMES LAWSON, WILLIAM AUGUSTUS WALKER, James Lawson, junior, and Thomas S. Sandford
against
HERMAN S. BACHMAN, DAVID S. BACHMAN, and Nathan S. Bachman.

GENTLEMEN: You will please take notice that the plaintiffs, James Lawson, William Augustus Walker, James Lawson, junior, and Thomas S. Sandford, hereby appeal to the court of appeals from the order made

by the general term of said superior court, in the above-entitled action, on the sixth day of January, 1879, and entered on the eighth day of January, 1879, reversing the judgment appealed from to said general term, and granting a new trial with costs to the defendants, appellants to abide the final issue or event of said action, and from each and every part of said order, and the said plaintiffs hereby assent that if said order is affirmed judgment absolute shall be rendered against them.

Dated New York, January 18, 1879.

Yours, &c.,

FREDERIC B. JENNINGS,
Attorney for Plainitffs.

To THOMAS BOESE, Esq., *Clerk.*
CHARLES F. MACLEAN,
Attorney for Defendants.

63 Superior court of the city of New York. General term. November, 1878.

JAMES LAWSON AND OTHERS
ag'st
HERMAN S. BACHMAN AND OTHERS.

Before Sedgwick and Freedman, *J. J.*

Appeal from judgment entered upon a verdict for plaintiff by direction of the court.

The action was for compensation for services by plaintiffs under the following written agreement:

"This agreement, made this 25th day of April. A. D. 1871, between Messrs. Bachman Brothers, of , and Lawson & Walker, of the city of New York, witnesses:

"That whereas the said Bachman Brothers have employed said Lawson & Walker, and authorized them by power of attorney, of even date herewith, to collect our claim arising out of the capture of the ship Commonwealth and her cargo by the armed rebel cruiser the Florida, the said Lawson & Walker agree to use their best efforts, at their own expense, to collect the said claim in the shortest practicable time, and to indemnify and save harmless the said Bachman Brothers from and against any and all loss or damage from any of the acts of the said Lawson & Walker in the premises.

"And the said Bachman Brothers agree to allow and pay to said Lawson & Walker a compensation equal to twenty-five (25%) per cent. of whatever sum shall be collected on the said claim."

The defendants also made their power of attorney to the plaintiffs to collect the claim which was described as it had been in the agreement.

64 Between the date of the agreement and some day in 1872, when the plaintiffs' firm dissolved and went into liquidation, the defendants handed to the plaintiffs the bill of lading and the invoice of the goods destroyed. The plaintiffs filed a notice and abstract of the claim in the Department of State, at Washington, and prepared a memorial stating the

circumstances of the claim, which on December 11, 1872, they sent to defendants, but never received it back. They also went to Washington to ascertain the condition of the case and the prospect of a settlement. The plaintiffs' firm went into liquidation in the year 1872. The testimony did not show what was the legal character of the claim, or against what person or government it was made.

Nothing further was done in the matter by plaintiffs nor communication had between them and defendants until 19th October, 1874.

In June, 1874, after the award of the arbitration of Geneva, Congress passed the act entitled "An act for the creation of a court for the adjudication and disposition of certain moneys received into the Treasury under an award made by the tribunal of arbitration, constituted by virtue of the first article of the treaty concluded at Washington," &c. The act created a court to pass upon claims for losses by the depredations of the Florida and other steamers, and to direct payment of valid claims out of the award.

On October 19, 1874, the plaintiffs, without a request of defendants, prepared a petition for the court, and enclosed it in a letter, which contained "please return to us, with the petition when signed, the memorial also signed, which we forwarded you for signature on December 11, 1872, and duplicate copies procured from the court, by which the orignals were granted, of your certificate of naturalization." This letter was signed "Lawson & Walker, in liquidation."

After this date, but in October, 1874, one of the defendants called upon one of the plaintiffs, and telling him in substance that the defendants had employed another attorney, requested him to surrender the invoice
65 and bill of lading, and to release them from the agreement. The person representing the plaintiffs surrendered the invoice and bill, but refused to release the defendants. Either before this interview the defendants had employed another person to represent them before the court established by the act, or shortly after it they employed him.

In due course the defendants received the amount claimed by them.

The defendants, through their new attorney, prosecuted their case before the courts and collected their damages in the sum of $3,034.

The plaintiffs gave testimony that if they had proceeded to collect they would have incurred expenses to about the amount of $125, and the court directed a verdict for them for one-quarter of the amount collected, less this expense.

The defendants took exception, having asked for a dismissal of the complaint.

Mr. Charles F. McLean, for appellants; Mr. Frederic B. Jennings, for respondents.

SEDGWICK, *J.*

The agreement of the plaintiffs "to use their best efforts, at their own expense, to collect the said claim in the shortest practicable time," did not specifically provide for the duration of time through which they were bound to make the efforts. It is very doubtful, at least, whether there was any implied obligation on the part of the defendants not to empower another agent in the same business. Assuming that there was, there was no time specified in which they were to allow the plaintiffs to act as sole

agents. Therefore the one could only claim a reasonable time, i. e., a period to be fixed according to the circumstances in which to collect the claim, and the other had the right, after this reasonable time, to proceed in his own way by other agents to collect the claim. This limitation as to time was a part of the contract as matter of law, and the power was not revocable because of the lapse of time, but then expired.

66 After the defendants omitted to sign and return the memorial sent to them December 11, 1872, the plaintiffs did nothing in act or word for two years. This want of action was not due to the defendants retaining the memorial. There was nothing to be done, and the memorial would have served no other purpose than was accomplished by filing the abstract of the claim in the State Department. I am of opinion that after so much time the agreement was at an end. It is also manifest from the circumstances that not only had the time which the law provided passed, but that the plaintiffs had ceased their efforts, and could not have, through the two years, done any service which would have had any effect in prosecuting the claim or securing its success.

So far as the testimony shows, or we may judge from the character of the case, there was nothing to be done. The defendants, therefore, had the right, which they used, of employing another attorney, and the plaintiffs' refusal to recognize this right did not affect its validity.

If this conclusion were not correct the combination of considerations in the case, viz, the lapse of time, the agents going into liquidation, the change in the intrinsic character of the claim from a claim against some government, resting upon general principles of international obligation to a claim against a fund which was not brought into existence by any effort of the plaintiffs, would convince me that the agreement had expired by its own limitations before the time in 1874, when the plaintiffs, without request of defendants, attempted to begin a new prosecution of the claim for damages.

The judgment should be reversed, and a new trial ordered with costs of appeal to appellant to abide the event of the action.

67 Court of appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 6th day of April, in the year of our Lord one thousand eight hundred and eighty, before the judges of said court.

Witness, the Hon. Sanford E. Church, chief judge, presiding.

E. O. PERRIN, *Clerk.*

Remit'tur—April 8, 1880.

JAMES LAWSON & O'RS, APPELLANTS,
ag'st
HERMAN S. BACHMAN & O'RS, RESPONDENTS.

Be it remembered that on the 15th day of February, in the year of our Lord one thousand eight hundred and seventy-nine, James

68 Lawson & o'rs, the appellants in this action, came here into the court by Frederick B. Jennings, their attorney, and filed in the said court a notice of appeal and return thereto from the order of the general term of the superior court of the city of New York, and Herman S. Bachman & o'rs, the respondents in said action, afterwards appeared in said court of appeals, by Charles F. McLean, their attorney.

Which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals having heard this cause argued by Mr. Frederick B. Jennings of counsel for the appellants, and by Mr. Edward W. Crittenden of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the general term of the superior court of the city of New York appealed from
69 in this cause be, and the same is hereby, reversed, and judgment on verdict affirmed with costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said superior court of the city of New York, there to be proceeded upon according to law.

Wherefore it is considered that the said order be reversed, &c., with costs as aforesaid.

And hereupon, as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the superior court of the city of New York, before the justice thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said superior court before the justices thereof, &c.

E. O. PERRIN,

70 *Clerk of the Court of Appeals of the State of New York.*

COURT OF APPEALS, CLERK'S OFFICE,
Albany, April 8, 1880.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] E. O. PERRIN, *Clerk.*

71 At a special term of the superior court of the city of New York, held at the court-house in said city on the 14th day of April, in the year eighteen huudred and eighty.

Present, Hon. John Sedgwick, justice.

JAMES LAWSON, WILLIAM AUGUSTUS WALKER, James Lawson, junior, and Thomas S. Sanford
against
HERMAN S. BACHMAN, DAVID S. BACHMAN, and Nathan S. Bachman.

Upon reading and filing the remittitur from the court of appeals in the above-entitled action, and upon motion of Frederic B. Jennings, the attor-

ney for the plaintiffs in said action, it is ordered that the judgment of said court be, and the same is hereby, made the judgment of this court:

And it is further ordered that the order of the general term of this court heretofore and on the eighth day of January, 1879, entered herein reversing the judgment of the court below and granting a new trial be, and
72 the same is hereby, reversed, annulled, and altogether held for nothing, and that the judgment of said superior court entered upon the verdict on the first day of July, 1878, be, and the same is hereby, affirmed with costs on the appeal to the general term, and also in the court of appeals to be taxed, and that judgment therefor be entered accordingly.

Enter.

J. S., *J.*

(Indorsed:) Superior court of the city of New York. James Lawson & o'rs vs. Herman S. Bachman and others. Order on remittitur. Frederic B. Jennings, plaintiffs' attorney, 56 Wall st. To Charles F. MacLean, esq., def'ts' att'y, 7 Nassau st. Filed April 14, 1880. 1880, iv, 16.

73 *Judgment.—April 19th*, 1880.

Superior court of the city of New York.

JAMES LAWSON, WILLIAM AUGUSTUS WALKER, James Lawson, junior, and Thomas S. Sanford

against

HERMAN S. BACHMAN, DAVID S. BACHMAN, and Nathan S. Bachman.

The plaintiffs in the above-entitled action having appealed to the court of appeals from the order made by the general term of this court in said action on the sixth day of January, 1879, and entered on the eighth day of January, 1879, reversing the judgment of the court below and granting a new trial and the said court of appeals, after hearing counsel for the respective parties, having ordered and adjudged that the said order of the general term appealed from be reversed, and that the said judgment of the superior court entered upon the verdict on the first day of July, 1878, be affirmed with costs, and the remittitur to that effect from the court of appeals having been duly filed herein, and an order duly made and entered
74 herein, making the judgment of said court of appeals the judgment of this court, and the costs of the plaintiffs having been taxed at the amount in that behalf hereinafter stated, now, upon motion of Frederic B. Jennings, attorney for said plaintiffs, it is ordered, adjudged, and decreed that the judgment of this court entered upon the verdict in this action on the first day of July, 1878, be, and the same is hereby, affirmed, and that the plaintiffs do recover from the defendants the amount thereof, with interest thereon as therein provided, and that the said plaintiffs do recover from the defendants the further sum of two hundred and eighty-one $\frac{19}{100}$ dollars, their costs and disbursements as taxed, and that they have execution against the said defendants therefor.

THOMAS BOESE, *Clerk.*

(Indorsed:) Superior court of the city of New York. James Lawson & o'rs vs. Herman S. Bachman & o'rs. Judgment. Frederic B. Jen-

nings, plaintiffs' attorneys, 65 Wall street. Filed April 19, 1880, at 10.25. Thomas Boese, clerk.

75 A writ of error to the superior court of the city of New York allowed.

FIELD, *J.*

76 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the superior court of the city of New York, greeting:

[SEAL.] Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court of the city of New York, upon a remittitur from the court of appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James Lawson, William Augustus Walker, James Lawson, junior, and Thomas S. Sandford, plaintiffs, and Herman S. Bachman, Nathan S. Bachman, and David S. Bachman, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United

77 States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said Herman S. Bachman, Nathan S. Bachman, and David S. Bachman, as by their complaint appears. We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the thirtieth day of April, in the year of our Lord one thousand eight hundred and eighty.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States,
By JAS. H. McKENNEY,
Deputy Clerk.

Allowed by

STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Court.

(Indorsed:) U. S. Supreme Court. Herman S. Bachman et al., pl'ffs in error, v. James Lawson et al., def'ts in error. Writ of error. Edward W. Crittenden, pl'ffs in error, 7 Nassau st., New York. Filed May 1, 1880.

78 The United States of America to James Lawson, William Augustus Walker, James Lawson, junior, and Thomas S. Sandford, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the superior court of the city of New York, wherein Herman S. Bachman, Nathan S. Bachman, and David S. Bachman are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Stephen J. Field, Associate Justice of the Supreme Court of the United States, this thirtieth day of April, in the year of our Lord one thousand eight hundred and eighty.

STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Court.

79 SOUTHERN DISTRICT OF NEW YORK, *ss:*

On this fourth day of June, in the year of our Lord one thousand eight hundred and eighty (1880), personally appeared David J. McNiece before me, the subscriber, Charles A. Runk, a notary public in and for the State of New York, duly commissioned and sworn, residing in the city of New York, and makes oath that he delivered a true copy of the within citation to Frederic B. Jennings, esquire, known to him to be the attorney and counsel of the defendants in error, at the city of New York, on the first (1st) day of May, 1880.

DAVID J. McNIECE.

Sworn to and subscribed the fourth day of June, A. D. 1880.

CHARLES A. RUNK,
Notary Public, N. Y. Co.

(Indorsed:) U. S. Supreme Court. Herman S. Bachman et al., pl'ffs in error, against James Lawson et al., def'ts in error. Citation and return. Edward W. Crittenden, pl'ffs att'y, 7 Nassau st., New York. Filed June 8, 1880.

80 Supreme Court of the United States.

HERMAN S. BACHMAN, DAVID S. BACHMAN, & Nathan S. Bachman, plaintiffs in error,
vs.
JAMES LAWSON, WILLIAM AUGUSTUS WALKER, James Lawson, junior, and Thomas S. Sandford, defendants in error.

Know all men by these presents that we, Herman S. Bachman, of No. 126 East Thirty-first street (126 E. 31st st.), in the city, county, and State

of New York, merchant, Charles Stern, of No. 140 East Sixty-fifth st., in said city of New York, merchant, and Emanuel A. Walter, of No. Forty-second st., in said city of New York, are held and firmly bound unto James Lawson, William Augustus Walker, James Lawson, junior, and Thomas S. Sandford in the sum of three thousand dollars ($3,000.00)
dollars, to be paid to the said James Lawson, William Augustus
81 Walker, James Lawson, junior, and Thomas S. Sandford, their executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals, dated this twenty-ninth (29th) day of April, in the year of our Lord one thousand eight hundred and eighty.

Whereas the above-named Herman S. Bachman, David S. Bachman, and Nathan S. Bachman, have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in an action in which the defendants in error, James Lawson, William Augustus Walker, James Lawson, junior, and Thomas S. Sandford were plaintiffs, and the plaintiffs in error, Herman S. Bachman, David S. Bachman, and
Nathan S. Bachman were defendants, by the superior court of the
82 city of New York, on remittitur from the court of appeals of the State of New York.

Now, therefore, the conditions of this obligation is such that if the above-named Herman S. Bachman, David S. Bachman, and Nathan S. Bachman shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HERMAN S. BACHMAN. [L. S.]
EMANUEL WALTER. [L. S.]
CH'S STERN. [L. S.]

Sealed and delivered in presence of—
EDWARD W. CRITTENDEN.

Page 1, line 16, the word "Watler" inserted before execution.

STATE OF NEW YORK,
City and County of New York, ss:

Emanuel Walter, being duly sworn, says that he is one of the above-named obligors; that he is a resident of and a freeholder within the State of New York, and is worth the sum of six thousand dollars ($6,000)
83 over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under execution.

E'L WALTER.

Sworn to before me this 29th day of April, 1880.
[L. S.] EDWARD W. CRITTENDEN,
Notary Public c'r't filed in N. Y. Co., (Kings Co.)

STATE OF NEW YORK,
City and County of New York, ss:

I, William A. Butler, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court

of record, do hereby certify that Edward W. Crittenden has filed in the clerk's office of the county of New York a certified copy of his appointment as notary public for the county of Kings with his autograph signature, and was at the time of taking annexed deposition duly authorized to take the same, and that I am well acquainted with the handwriting of said notary public, and verily believe that the signature to the annexed certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court and county the 29' day of April, 1880.

[L. S.] WM. A. BUTLER, *Clerk.*

STATE OF NEW YORK,
City and County of New York, ss:

Charles Stern, being duly sworn, says that he is one of the above-named obligors; that he is a resident of and a freeholder within the State of New York, and is worth the sum of six thousand dollars ($6,000.00) over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

CH'S STERN.

Sworn to before me this 29th day of April, 1880.

[L. S.] EDWARD W. CRITTENDEN,
Notary Public cert. filed in N. Y. Co., Kings Co.

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on the 29th day of April, in the year of our Lord one thousand eight hundred and eighty (A. D. 1880), before me, Edward W. Crittenden, a notary public in and for the State of New York, duly commissioned and sworn, dwelling in the city of Brooklyn, *before me* personally came Herman S. Bachman, Emanuel Walter, and Charles Stern, with whom I am personally acquainted, and known to me to be the individuals described in and who executed the foregoing bond or obligation, and severally acknowledged to me that they executed the same for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my official seal the day and year first-above written.

[L. S.] EDWARD W. CRITTENDEN,
Notary Public.

Approved:

FIELD, *J.*

APRIL 30TH, 1880.

(Endorsed:) U. S. Supreme Court. Herman S. Bachman et al., pl'ffs in error vs. James Lawson et al., def'ts in error. Bond for supersedeas. Edward W. Crittenden, att'y, &c., for pl'ffs in error, 7 Nassau st., New York. Filed May 1st, 1880.

(Indorsed:) U. S. Supreme Court. Herman S. Bachman et al. against James Lawson et al. Writ of error & return. Edward W. Crittenden, attorney for pl'ffs in error, 7 Nassau st., New York.

87 Superior court of the city of New York.

JAMES LAWSON & O'RS
against
HERMAN S. BACHMAN & O'RS.

CLERK'S OFFICE,
Superior Court of the City of New York.

I, Thomas Boese, clerk of the superior court of the city of New York, having compared the annexed copies of the record and whole of the proceedings and bond and citation in the above-entitled action with the original on file in this office, do certify that the same are correct transcripts therefrom, and of the whole of said originals.

In witness whereof I have hereunto subscribed my name and affixed the seal of the superior court of the city of New York, this twelfth day of October, A. D. 1880.

[SEAL.] THOMAS BOESE, *Clerk.*

(Indorsement on cover:) No. 160. Herman S. Bachman, Nathan S. Bachman, and David S. Bachman, plaintiffs in error, vs. James Lawson, William Augustus Walker, James Lawson, jr., and Thomas S. Sandford. New York City superior court. Filed 20th October, 1880.

109-657

OFFICE SUPREME COURT U. S.
FILED
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JAMES H. MCKENNEY, CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

HERMAN S. BACHMAN AND OTHERS, PLAINTIFFS IN ERROR,

vs.

JAMES LAWSON AND OTHERS.

IN ERROR TO THE SUPERIOR COURT OF THE CITY OF NEW YORK.

BRIEF FOR PLAINTIFFS IN ERROR.

EDWARD JORDON,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

October Term, 1883.

HERMAN S. BACHMAN AND OTHERS,
Paintiffs in Error,
vs.
JAMES LAWSON AND OTHERS.

In error to the Superior Court of the City of New York.

Brief for Plaintiffs in Error.

Statement of Facts.

The plaintiffs in error, who were doing business in the city of New York, under the firm-name of Bachman Brothers, and who about the 17th day of April, 1863, had had a cargo of merchandise captured and destroyed by the insurgent cruiser Florida, entered into an agreement on the 25th day of April, 1871, with the defendants in error, James Lawson, William Augustus Walker, James Lawson, Jr., and Thomas S. Sandford, who were copartners, doing business in said city, in the firm-name of Lawson & Walker, whereby the latter agreed to use their best efforts, at their own expense, to collect the claim of the plaintiffs in error for said loss, in the shortest practicable time ; and said plaintiffs in error agreed to allow and pay said Lawson & Walker a compensation equal to twenty-five per cent. of whatever should be collected on said claim (Record, pages 5 and 6, folios 9 and 10).

The defendants in error, soon after the date of said agreement, filed an abstract of the claim with the Department of State ; prepared a memorial giving a history of the claim, and sent it to the plaintiffs in error for signature, and went to Washington several times about this and other like claims. This is all that appears to have been done by them until after the passage of the Act of Congress of June 23, 1874, establishing the Court of Commissioners of Alabama Claims (Record, page 11, folios 21 and 22).

After the passage of that act the defendants in error, or some of them, the firm of Lawson & Walker having gone into liquidation (Record, page 13, folio 26), prepared a petition to said Court of Commissioners, setting forth the facts in regard to said claim, and sent the same to the plaintiffs in error for signature, but it was not returned (Record, pages 11 and 12, folios 22, 23 and 24).

Thereafter interviews were had between the parties in which the plaintiffs in error sought to obtain the consent of Lawson & Walker to release the former from said agreement, but the latter

allege that they declined to give such consent (Record, pages 14 and 16, folios 26 and 31. They, however, on demand of the plaintiffs in error, delivered up to them an invoice and bill of lading of the merchandise destroyed (Record, pages 17 and 18, folios 34 and 35).

Lawson & Walker were not lawyers, but average adjusters (Record, page 13, folio 26).

About the time of the interviews in question the plaintiffs in error employed the Hon. Cornelius Cole, of San Francisco, to prosecute said claims before the Court of Commissioners, which he did, and recovered thereon the sum of $3,034.16 (Record, page 9, folio 17).

The defendants did not actually collect anything on account of the claim, but brought suit in the Court below for $633.54, being twenty-five per cent. of the amount recovered by Mr. Cole, less $125, the estimated expenses which would have been incurred by them had they proceeded and recovered the money (Record, page 13, folio 25).

The plaintiffs in error, in the Court below, maintained and asked the Court to rule, among other things,

That the plaintiffs below could not recover;

Because they had not shown a performance of the contract on their part; nor that they were prevented from performing it;

Because the compensation of the plaintiffs below was, by the agreement, made dependant upon their recovery of the money, and they had not recovered it;

Because, subsequent to the making of the agreement, a state of facts arose, not contemplated by it, by reason of which it became inoperative;

Because the Act of Congress of June 23, 1874, rendered the action of attorneys-at-law necessary for the collection of the claim, and the plaintiffs not being attorneys-at-law, could not collect it, or carry out the agreement if it subsisted;

And because the agreement was annulled and rescinded by the Act of Congress before mentioned (Record, pages 24 and 25, folios 47 to 50.

And on these and other grounds the plaintiffs in error moved the Court to dismiss the complaint in the action, or for a nonsuit.

But the Court overruled the motion, and directed a verdict for the plaintiffs below, for $633.54 damages, and $92.36 interest, making in all $725.90, for which sum, with costs and disbursements, judgment was finally rendered (Record, page 25, folio 50; pages 28 and 29, folio 57, and page 35, folios 73 and 74).

Errors.

The Court below erred in overruling the motion of the defendants below, and in directing a verdict and rendering judgment for the plaintiffs below.

POINTS.

I.

The agreement sued on was rendered null and void by the 18th section of the Act of June 23, 1874.

The purpose and effect of that enactment was, not merely to render void specific liens upon such claims, or actual assignments, sales or transfers thereof, but to render illegal and void all agreements made before judgment and the issue of warrant therefor, to pay compensation for services about any such claim, and to limit the compensation recoverable in any case to such sum as should be awarded by the Court of Commissioners.

Any other construction of the enactment would deprive it of almost all salutary effect.

II.

The Act of Congress, by prescribing a mode of proceeding for the collection of such claim, which required the services of attorneys-at-law, in effect rendered the agreement in question inoperative, since it rendered the defendants in error incapable of performing it on their part.

III.

The agreement sued on had relation solely to the prosecution and collection of such claim as existed at the time the agreement was entered into. *That* claim, whatever it may have been, was extinguished by the operation of the treaty with Great Britain, the award made at Geneva, and the payment to the United States of the sum awarded. (See Treaty, Article II., Revised Statutes relating to the District of Columbia, &c., page 360.) It therefore became incapable of being collected, and the agreement, consequently, became inoperative.

IV.

The claim which was successfully prosecuted was a new claim, created by the Act of Congress, after the making of the agreement and not contemplated by it. This is the view which has prevailed in the Court of Commissioners; in Congress and in the political departments of the Governments of the United States and Great Britain; and, it is submitted, cannot be successfully controverted. The agreement, therefore, has no application to that claim.

V.

The compensation of the plaintiffs below was, by the express provisions of the agreement, dependent on their collection of the claim. They could only maintain their action, therefore, on one of two grounds, either that they had collected the claim, or that they had been prevented from so doing by the defendants below. There is no pretense that they actually collected anything, and the only ground for any charge that the plaintiffs in error prevented them from collecting the claim they undertook to collect, is that, as alleged, the former prevented their collecting the new claim created by the Act of Congress. It is submitted that no act of the plaintiffs in error in regard to such new claim could have any effect upon the collection of the original one.

VI.

Even admitting the identity of the claim in respect to which the agreement was made with that which was finally collected, it is manifest that the Treaty, the Award, and the Act of Congress, brought about an entirely new state of circumstances affecting it, not contemplated by the agreement, giving substance and definiteness to what before was unsubstantial and shadowy, providing a remedy which before did not exist, and prescribing modes of proceeding which the plaintiffs below were not qualified to conduct. These were of so radical a nature as to change the whole character and aspect of the claim, and as to render the agreement no longer applicable to it or to its collection. It must, therefore, be held to have become no longer operative.

VII.

It would be highly inequitable to permit the plaintiffs below to recover the compensation provided for the collection of a claim situated as this claim was when the agreement was made, on the ground that they *might* have collected it under the circumstances afterwards created by the Treaty, Award, and Act of Congress. It is to be presumed that no such agreement would have been assented to by the plaintiffs in error had the claim been then in the condition in which it was afterwards placed by the public acts referred to.

VIII.

If the plaintiffs below were entitled to demand anything of the plaintiffs in error it was for the reasonable value of their services rendered to the latter under an agreement which, without the fault of either party, had become inoperative; but this is not the ground on which the judgment in this case was rendered, but on the ground that the agreement was still subsisting and furnished the measure of damages. That judgment was erroneous and should be reversed.

Edward Jordan
for Plffs. in Error.

109-659

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

HERMAN S. BACHMAN, and others,

Plaintiffs in error.

vs.

JAMES LAWSON, and others,

Defendants in error.

BRIEF FOR DEFENDANTS IN ERROR.

FREDERIC B. JENNINGS,
OF COUNSEL.

Supreme Court of the United States,

OCTOBER TERM, 1883.

HERMAN S. BACHMAN, and others, *Plaintiffs in error.* *vs.* JAMES LAWSON, and others, *Defendants in error.*	No. 160.

Brief for defendants in error on Writ of Error to the Superior Court of the City of New York.

STATEMENT.

This action was brought upon an agreement made in April, 1871 (folio 51), by which the defendants in error were employed and authorized, as the agents and attorneys in fact of the plaintiffs in error, and undertook to collect for them a claim arising from the capture of the ship "Commonwealth" and her cargo by the armed rebel cruiser "Florida," being one of the Alabama claims, so-called, and

the plaintiffs in error agreed to pay the defendants in error for their services and expenses "a compensation equal to twenty-five per cent. of whatever sum should be collected on said claim." The agreement was accompanied by a proper power of attorney, executed at the same time, and referred to therein (folio 851-52).

The defendants in error, in pursuance of this agreement and power, entered upon the employment thereunder, and prepared such papers as were necessary for the prosecution of the claim, filing some of them with the State Department at Washington, doing very considerable work, and incurring considerable expense in and about the matter.

In June, 1874, and more than three years after the agreement was made, during which time they had taken all the steps, and made all the progress they could toward the collection of the claim, the Act of Congress, creating the Court of Commissioners of Alabama Claims was passed, and said Court was established thereunder.

That act, and the rules of the Court made it necessary to present a petition to the Court, setting forth the facts upon which the claim was based, which petition was required to be signed and verified by the petitioners themselves, (in this case by the plaintiffs in error.)

The defendants in error prepared such a petition, and, in October, 1874, forwarded the same to the plaintiffs in error for their signature and verification, which they, in spite of repeated requests by the defendants in error, failed to return to them, making it impossible for them to proceed further with the collection of the claim.

The defendants in error fulfilled their agency and performed their part of the agreement so far as they could without the co-operation of the plaintiffs in error, which was refused, and repeatedly offered to completely fulfill their part of the agreement, and prosecute the claim to judgment and recovery, but were prevented by the plaintiffs in error.

The plaintiffs in error late in 1874, and after the claim had

ceased to be a difficult or doubtful one, and its collection had by the aid of the efforts of the defendants in error and others been made easy and certain, attempted to rescind the agreement and, in disregard of it, employed an attorney by whom the claim was presented and a judgment obtained, under which there was afterwards paid to the plaintiffs in error in May, 1876, in settlement of this claim, the sum of three thousand and thirty-four dollars and sixteen cents.

This action was brought in July, 1877, to recover from the plaintiffs in error the sum of six hundred and thirty-three dollars and fifty-four cents, being a sum equal to twenty-five per cent. of the amount collected on the claim as above stated, less the sum of one hundred and twenty-five dollars, the amount which it would have cost the defendants in error to have further prosecuted the claim to judgment and settlement, and the complaint also contains a count for work, labor and services, claiming the same amount as their reasonable compensation for labor and expense actually incurred.

A number of defences were set up by the answer and presented at the trial, one of which (though by no means the principal one or much relied upon), and the only one at all material here, was that all such agreements as this were annulled by the eighteenth section of the Act of Congress establishing the Court of Commissioners of Alabama Claims.

The jury at Trial Term, by direction of the Court, rendered a verdict for the defendants in error (then plaintiffs) and judgment was entered accordingly.

The General Term of the Superior Court, upon appeal, reversed the judgment, and ordered a new trial, though not upon the ground that this agreement was annulled by said Act, but upon an entirely different ground not necessary to be discussed here.

The defendants in error appealed to the Court of Appeals, which reversed the order of General Term, and affirmed the judgment.

The plaintiffs in error have brought the case here upon writ of error under § 709 of the Revised Statutes.

There is an error in the form of the writ which seems to have been prepared under the twenty-fifth section of the old Judiciary Act rather than under that Act as changed and amended in 1867, and incorporated into the Revised Statutes.

First Point.—The Act in question does not include and has no application whatever to this case, and there was no error in the decision of the Federal question.

The 18th section of the Act, in question, is as follows:

"SECTION 18. That in case any judgment is rendered by said "Court for indemnity for any loss or claim hereinbefore men- "tioned against the United States at the time of the giving "of the judgment, the Court shall, upon motion of the attor- "ney or counsel for the claimant, allow, out of the amount "thereby awarded, such reasonable counsel and attorney fees "to the counsel and attorney employed by the claimant or "claimants respectively as the Court shall determine is just "and reasonable, as compensation for the services render- "ed the claimant in prosecuting such claims, which allow- "ance shall be entered as part of the judgment in such case, "and shall be made specifically payable as a part of said "judgment for indemnification to the attorney or coun- "sel, or both, to whom the same shall be adjudged; and "a warrant shall issue from the Treasury in favor of the "person to whom such allowance shall be made respec- "tively, which shall be in full compensation to the counsel "or attorney for prosecuting such claim; and all other liens "upon, or assignments, sales, transfers, either absolute or "conditional for services rendered or to be rendered about "any claim or part or parcel thereof provided for in this

"bill heretofore or hereafter made or done before such "judgment is awarded, and the warrant issued therefor, shall "be absolutely null and void and of none effect."

a. In construing this section the Court must take the strict and literal meaning of the words used as they are entirely free from ambiguity and doubt, and cannot at all enlarge or extend the effect of the Act beyond what is expressly included in those words.

Dean vs. *Reid*, 10 *Peters*, 527.
Priestman vs. *U. S.*, 4 *Dallas*, 30.

Especially is this true in cases where,as here, the construction asked for would give to the act the retroactive effect of annulling an agreement made long before its passage, and destroying vested rights lawfully acquired under such agreement prior to the passage of the Act.

Sedgwick on the Construction of Statutory, &c., Laws, 2d Ed. p. 161*n*-163*n, and cases cited.*
Ryan . Green, 58, *N. Y.*, 304, *and cases cited.*

Applying this rule, no further argument is necessary, but a simple reading of the agreement and power of attorney will show that they are not included in or affected by this act.

Their intent and legal effect was the employment of agents to perform certain services in relation to this claim, for which an agreed compensation was to be paid. Such compensation was not to be paid out of the claim or any monies received from it.

The defendants in error were to be paid *not a part*

of the sum collected, but a *compensation*, which, for the purpose of being made definite, was fixed at a sum equal to twenty-five per cent. of whatever sum might be collected. *No interest in the claim whatever was or was intended to be transferred or acquired by this agreement.* It is plain that such an agre ment does not come within the act in question The agreement constitutes neither a *lien* upon nor an *assignment, sale* or *transfer* of any portion of this claim or any part of the money to be received upon it.

The opinion of the Court of Appeals reported (though not fully) in 81 N. Y. Reports, p. 616, is so pertinent and forcible that it is ventured to quote so much of it as relates to this question. The Court says: "It is argued that there is no "cause of action. *First*, * * * * * *Second*, "because the agreement was annulled by the Act "of Congress, that provided for the distribution of the "Alabama award, U. S. Stats. 1874, Chap. 459, § 18, "p. 249. That act prohibits and annuls 'liens, "assignments, sales and transfers, absolute or condi- "tional,' for services past or prospective about any "claim. Manifestly its prohibiting and avoiding "words do not touch an agreement to compensate "for services wherein the only mention of the claim "is to state a percentage of the sum of it as the "amount of the compensation. The agreement in "this regard is like one to pay for services a sum "equal to a named proportion of the profits of a "partnership. In such a case there is no interest "given in the profits as such, and the promisee does "not become liable for debts as a partner, though as "a general rule, a right to a share of profits makes "liable. By the agreement the plaintiffs got no in- "terest in the claim."

This case, clearly, then does not come within the express words of the Act.

b. Nor does it come within its meaning?

If it be claimed that, in construing this statute, the Court may seek for the intent of the law-making power, it is insisted that it must do so, if at all, for the purpose solely of interpreting the words of the statute, "but not to extend the law to a "case not within its fair meaning."

Potter's Dwarris on Statutes, p. 205.
Beebe v. *Griffin*, 14 N. Y., 244.
McClusky v. *Cromwell*, 11 N. Y., 601.

(1.) If the whole of the 18th section is read together as it is written, it seems doubtful if Congress intended to do more than provide that attorneys and counsel presenting the claims might have their compensation fixed and allowed by the judgment, and that any other interest, which *they* had acquired in the claims by sale or assignment, should then be void. This construction is further sustained by the fact that the existence of the Act of 1853, (R. S. § 3477), forbidding assignments of claims against the U. S. in very similar words, renders wholly unnecessary the provisions of this 18th section, if general in its application. Probably it has reference only to the cases mentioned in the same section. If that be so, it of course has no application to this case, for by their disregard and violation of this agreement the plaintiffs in error prevented the defendants in error from making application to the Court for such allowance in accordance with this section, and they had no opportunity to do so.

(2.) But if the latter part of the section is general in its application, it is plain that it could not have been intended to apply to any cases except those

specified, namely, cases where an actual legal interest in the claim itself and its proceeds had been acquired by sale or assignment.

Congress, in providing for the distribution of the Geneva award, and the allowance of these claims upon it, might with perfect propriety impose such conditions as it chose in the distribution of the award, and say that none but the original actual owners of claims should have any legal interest in that fund. But it could not with such propriety annul contracts, like this, between private individuals, and affecting only their relations with each other, which did not transfer or assume to transfer any interest in such claim or any portion of that fund, and had no connection whatever with such claim or fund, except to provide for certain services in respect thereto, and for a proper compensation for such services, entirely outside of that fund or any receipts from it, and it can not be reasonably presumed that Congress intended by this Act to accomplish any such result.

(3.) Nor will it aid the plaintiffs in error to say that the intention of Congress, in passing this law, was to prevent traffic and speculation in these claims.

For it is plain that, by the agreement in question, no such idea was entertained by either of the parties to it, and no such attempt was made or carried out. The sum fixed as compensation for the work to be done under it was not exorbitant, and was, in fact, scarcely adequate for the services and expenses which had been already actually rendered and incurred. The reference to the amount which should be collected as the means of fixing the amount of compensation was made *really for the benefit of the plaintiffs in error*, and very naturally made, on ac-

count of the uncertainty in their minds, in common perhaps with the greater portion of the people at that time, as to whether anything would ever result from these claims, and their unwillingness to incur expense in respect to them, and the greater acquaintance of the defendants in error with the subject, and consequently somewhat greater confidence that the claim would eventually result in some payment thereon.

(4.) The Alabama Claims Court has decided that neither this act, nor the act of 1853 invalidates even express assignments made prior to the passage of this act, upon the ground that the subject of the assignment was not then such a claim against the U. S., as is intended by those acts.

Osgood & Stevens vs U. S., Davis' Alabama Claims Rep. 24.

Stevens vs. *The U. S., decided in* 1883.

c. The power of attorney given with the agreement and as well the careful wording of the agreement upon this point at a time when this act had not been passed, and when there was nothing to suggest to the parties drawing it, the idea of attempting to evade its prohibiting words, shows conclusively that it was not the intention of the parties to transfer this claim or any portion of it or any part of the moneys,which should be received thereunder, to the defendants in error, but simply to authorize and empower them as the agents of the plaintiffs in error, to collect this claim and to use this very natural and reasonable method of ascertaining and fixing the amount of compensation, which *they were willing to pay* for the services and expenses to be rendered and incurred in the prosecution and collection of the claim.

It is insisted then with confidence that this alleged ground of error in the Court below cannot be sustained unless the Court shall enlarge and extend the meaning of this Act, so as to include in it a case, which the words of the act do not include, and which Congress did not intend to include in it.

Second Point.—The points in the plaintiff's brief are not well taken and cannot be sustained.

The first point having already been sufficiently answered, the other points will now be briefly considered.

a. The defense referred to in the second point does not come within the jurisdiction of, and will not be considered by this court. (See fols. 20 and 49).

Murdock vs. *City of Memphis*, 20 *Wall.* 590.

Nor could that defense be sustained upon the merits.

(1). There is no evidence that the defendants in error were not attorneys at law.

(2). The agreement plainly contemplated the employment of attorneys at law by the defendants in error if necessary, for the power of attorney given with it authorized them "to prosecute and collect by such "lawful proceedings and means as to them may "appear expedient" the claim, and "to employ for "the prosecution of the claim such attorney or "attorneys as they may think fit." (Fol. 52).

b. The third, fourth, fifth, sixth, seventh and eighth points are not entitled to consideration.

(1.) They do not raise any questions which give this Court jurisdiction.

No "title, right, privilege or immunity, was specially set "up or claimed" in those respects, as required by § 709 of the R. S.

(2.) They were not set up as defences in the answer or in the Court below, and do not appear in the Record.

(3.) The character of the claim was necessarily indefinite at the time this agreement was made, but it is perfectly clear that, however changed in its nature or aspect, the claim finally collected was the *same claim* described in the agreement, namely the "claim arising out of the capture of the ship Com- "monwealth and her cargo by the armed rebel "cruiser the Florida."

And the agreement and power of attorney plainly contemplate and provide for its collection by the defendants in error by whatever means and in whatever form might become necessary or proper under any new or different aspect, which it might assume by reason of subsequent legislation or other proceedings.

So far from holding as the plaintiffs counsel contends, the Alabama Claims Court has uniformly sustained assignments of these claims, when made before the passage of the Act of Congress.

(4.) If the plaintiff's view that the claim finally collected under the Act of 1874 was a totally different claim be sustained, then clearly that Act has no application to this agreement, and there is no question in the case to give this Court jurisdiction.

e. In special answer to the 8th point it is claimed that

the complaint and proof are sufficient to sustain the judgment upon the quantum meruit alone, (see fols. 8 and 25.)

Third Point.—The judgment should be affirmed with costs and damages for delay.

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Of Counsel for defendants in error.